TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 910

A. B. KIRSCHBAUM COMPANY, PETITIONER,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 29, 1942.

CERTIORARI GRANTED MARCH 2, 1942.

INDEX.

	Page
Proceedings in U. S. C. C. A., Third Circuit	1
Appendix to appellant's brief	1
Appendix to appellee's brief	187
Minute entry of argument and submission	211
Opinion, Maris, J.	213
Judgment	223
Clerk's certificate	223
Order allowing certiorari	224

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

OCTOBER TERM, 1941. No. 7733.

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,

vs.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania Corporation,

Appellant.

Appendix to Appellant's Brief.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn Race 6067.

INDEX.

	Page
Docket Entries	1
Amended Complaint	3
Answer to Amended Complaint	8

Testimony:

Plaintiff's	Dir.	Cr.	Re-Dir.
Arthur H. Chalker	15		
William Mentzel	19	32	34
George Simon	35		
Harry Gallagher	43	47	
Samuel H. Fleming	48		
George Epps	54	61	
Nick Cattelise	62		
McKinley Edwards	65	70	71
Charles Moetsch	72	79	
Ben Rash	82	89	93
Louis Casciato	94	103	
Admissions by Defendant for Purposes of this case	105		
Adolph W. Haber	106	114	117
Nicholas D'Alonzo	118	129	
Samuel Sharlit	134	141	
Irving Glonninger	144	151	154
Frederick L. Hewes	155	162	

Defendant's:

Edwin G. Frank	165
Plaintiff's Requests for Findings of Fact and Conclusions of Law	168
Opinion, Kirkpatrick, J. sur Pleadings and Proofs	175
Judgment	181
Exceptions of Defendant to Findings of Fact and Conclusions of Law	183
Order of Court Suspending Injunction Pending Appeal	185

IN THE

District Court of the United States

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION FILE No. 798.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania Corporation,

Defendant.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

Mar. 14, 1940	Complaint, filed.
" 14, "	Summons exit.
" 25, "	Summons returned: "on Mar. 14, 1940 served" and filed.
" 26, "	Appearance of Sidney L. Krauss, Esq., and Wm. Clarke Mason, Esq., for Defendant filed.
" 27, "	Motion for more definite statement filed.
Apr. 4, 1940	Order to place case on Argument List filed.
" 15, "	Argued sur motion for more definite statement. Eo die: Motion granted.

"	19, "	Amended Complaint filed.
"	26, "	Answer to Amended Complaint filed.
May	11, 1940	Order to place case on Trial List filed.
Nov.	15, 1940	Trial — (Kirkpatrick J.) Witnesses Sworn.
"	18, "	Trial concluded by 12/23/40.
Dec.	2, 1940	Testimony filed (2 vol.)
Apr.	2, 1941	Opinion, Kirkpatrick, J., granting judgment for plaintiff filed.
"	28, "	Judgment in favor of Plaintiff granting Injunction filed. 4/28/41 noted.
"	28, "	Exceptions on behalf of Defendant to findings of the Court filed.
"	28, "	Defendant's notice of appeal filed. 4/29/41 Copy to J. M. Gallagher, Esq.
"	28, "	Bond for costs sur appeal in sum of $250 with Fidelity & Deposit Company of Md., surety filed.
"	28, "	Motion for stay of injunction pending appeal filed.
"	28, "	Order of Court suspending injunction pending appeal filed. 4/28/41 noted.
"	28, "	Supersedeas bond in sum of $1000 with cash security and Order of Court approving bond filed. 4/28/41 noted.
"	28, "	Copy of Clerk's Notice to U. S. Circuit Court of Appeals filed.
May	17, 1941	Statement of Points on which defendant intends to rely, filed.
"	17, "	Designation of contents of record on appeal, filed.
"	20, "	Plaintiff's requests for findings of fact and conclusions of law, filed.
"	26, "	Appellee's designation of additional portions of record on appeal filed.
"	26, "	Acknowledgment of service of designation by appellee filed.

PLAINTIFF'S AMENDED COMPLAINT.
(Filed Apr. 19, 1940.)

I. Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)-(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title, 29, Sec. 201 *et seq.*), hereinafter called the "Act".

II. Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Pennsylvania, having its principal office and place of business at Broad and Carpenter Streets, Philadelphia, Pennsylvania, within the jurisdiction of this Court.

IV. Defendant is the owner of a six-story and basement building situated at the southeast corner of Broad and Carpenter Streets, in the city of Philadelphia, Pennsylvania, formerly occupied by defendant as a factory for the production of men's clothing but now operated as a loft building, portions of which are leased by defendant to various tenants who engage in the production in said building of goods for interstate commerce, to wit: men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, and other portions of said building are leased to a tenant engaged in the receipt and warehousing in said building of furniture from states other than Pennsylvania and the shipment of furniture from said building to states other than Pennsylvania.

V. All of the tenants who occupy the first, second, third, fifth and sixth floors of defendant's building are engaged in the production of men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, in

the course of which they receive raw materials, partly finished garments and finished garments from and through states other than the State of Pennsylvania, and ship out materials, partly finished garments and finished garments from their places of business in defendant's said building in Philadelphia, to, into, and through states other than the State of Pennsylvania, and the tenant occupying the basement is engaged in interstate commerce as aforesaid.

VI. Defendant, pursuant to agreements of lease with its said tenants and in consideration of the rentals paid by said tenants and other payments by said tenants, employs in said building employees who are engaged in interstate commerce and in the production of goods for interstate commerce as defined by Section 3(j) of the Act, or in processes or occupations necessary thereto, such employees being engaged *inter alia* in the operation of elevators within the building for the use of the tenants, their employees, customers and visitors, and for the transportation of goods shipped to the said tenants from outside the State of Pennsylvania and for the transportation of goods produced by the said tenants and shipped by them to consignees outside the State of Pennsylvania; in the transportation and handling of the furniture, raw materials, partly finished garments and finished garments belonging to or produced by the tenants in connection with the shipment of the said articles in interstate commerce or their production for interstate commerce; in the production and generation of steam for the operation of the said elevators, for the heating of the building and the parts thereof used by the said tenants in interstate commerce and in the production of goods for interstate commerce, and for the operation of machines and equipment used by the said tenants and their employees in the production of goods for interstate commerce; in the maintenance and repair of machines, equipment, fixtures and premises used by the said tenants and their employees in interstate commerce and in the produc-

tion of goods for interstate commerce; in the guarding and watching of the premises, equipment, materials and merchandise of the said tenants used in interstate commerce and in the production of goods for interstate commerce; in the cleaning, maintenance and repair of those portions of the building used and occupied by the said tenants in interstate commerce and in the production of goods for interstate commerce and other portions of the building used in common by said tenants and their employees engaged in the production of goods for interstate commerce and in interstate commerce; and in the performance of other work, duties, processes and occupations in interstate commerce, and in the production of goods for interstate commerce for and on behalf of the said tenants.

VII. During the period beginning October 24, 1938, the effective date of Section 6(a) (1) of the Act, and continuously through October 23, 1939, defendant paid to some of its aforesaid employees wages at rates less than twenty-five cents (25¢) an hour for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid; and, during the period beginning October 24, 1939, the effective date of Section 6(a) (2) of the Act, and continuously to the date hereof, defendant has paid to some of its aforesaid employees wages at rates less than thirty cents (30¢) an hour for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid. By failing and refusing to pay its said employees wages at rates not less than the said rates during the said periods, defendant has violated and is violating the provisions of Sections 6 and 15(a) (2) of the Act.

VIII. During the period beginning October 24, 1938, the effective date of Section 7(a) (1) of the Act, and continuously through October 23, 1939, defendant employed certain of its aforesaid employees, who were engaged in

interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7(a) (2) of the Act, and continuously to the date hereof, defendant has employed certain of the aforesaid employees, who were engaged in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and has failed and refused to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of sections 7 and 15(a) (2) of the Act.

IX. The goods produced by defendant's tenants in defendant's building at Broad and Carpenter Streets, Philadelphia, Pennsylvania, compete with similar goods produced in other states and defendant's tenants in their said businesses compete with manufacturers of men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, and dealers in furniture located in other states.

X. Defendant has, since the effective date thereof, continuously violated the aforesaid provisions of the Act and threatens and intends to continue to violate the said provisions unless enjoined and restrained by a judgment of this Court.

XI. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a) (2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

/s/ GEORGE A. MCNULTY,
General Counsel,
/s/ IRVING J. LEVY,
Assistant General Counsel,
/s/ J. M. GALLAGHER,
Regional Attorney,
/s/ ERNEST N. VOTAW,
Attorney,
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DEFENDANT'S ANSWER TO AMENDED COMPLAINT.

(Filed April 26, 1940.)

The defendant, A. B. Kirschbaum Company, denying that the amended complaint herein is a full or fair compliance with the order of the court upon the defendant's motion for a more definite statement filed in this cause and reserving all of its rights to complain thereof, files this its answer to the said amended complaint as follows:

I. Admits that there is the "Act" described in paragraph I of the amended complaint but denies that it is a legal foundation for the action brought by the plaintiff herein.

II. Denies the averments contained in paragraph II of the amended complaint.

III. Admits the averments contained in paragraph III of the amended complaint.

IV. Denies, or is without knowledge or information sufficient to form a belief as to the truth of, the averments contained in paragraph IV of the amended complaint, except as hereinafter expressly admitted.

Admits that the defendant is the owner of a six-story and basement building situated at the southeast corner of Broad and Carpenter Streets, in the City of Philadelphia, Pennsylvania; that said building was formerly occupied by defendant as a factory for the production of men's clothing but it is now operated as a loft building and that the defendant does not now engage, nor has it since October 24, 1938 engaged, in any manufacturing, either in said building or elsewhere; and that portions of said building are now leased by defendant to various tenants, some of whom engage in the production in said building of goods

for interstate as well as intrastate commerce, some of whom engage in the production in said building of goods for sale at retail either on said premises or in Philadelphia, and at least two others of whom make no shipment of merchandise from said building to consignees outside the City of Philadelphia.

Also admits that the basement of said building is leased to Lit Brothers, a Pennsylvania corporation, engaged in the conduct and operation in Philadelphia of a retail department store, and that said basement is utilized as a warehouse by Lit Brothers in the conduct and operation of said retail business, and that some of the furniture stored in said basement is shipped to Lit Brothers from states other than Pennsylvania.

V. Denies, or is without knowledge or information sufficient to form a belief as to the truth of, the averments contained in paragraph V of the amended complaint, except as hereinafter expressly admitted.

Admits that each of the following articles, to wit: men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, are produced in said building by one or more of the defendant's tenants who occupy the first, second, third, fifth and sixth floors, or portions thereof, of said building. Admits further according to the best of its knowledge that in the course of the production of the articles aforesaid, one or more of said tenants receives raw materials from and through states other than the State of Pennsylvania, as well as from points in the State of Pennsylvania; that at least two of said tenants receive partly finished garments from points in the State of Pennsylvania only; that one or more of said tenants ship out or deliver finished garments, to, into and through states other than the State of Pennsylvania, as well as to points within the State of Pennsylvania; and that at least one tenant ships out finished garments to points in the State of Pennsylvania only.

VI. Denies the averments contained in paragraph VI of the amended complaint except as hereinafter expressly admitted.

Defendant admits that as the owner of said loft building, it employs and has employed since October 24, 1938, certain persons necessary properly to operate, maintain and protect its said building as a place in which to perform the obligations assumed by the defendant as landlord under the agreements of lease with its several tenants, but it denies that any employee as its employee while engaged in any service for it, is engaged in interstate commerce, or in the production of goods for interstate commerce, or in processes or occupations necessary thereto, within the meaning of the Act or otherwise.

Defendant avers that it engages, inter alia, persons who from time to time operate the elevators in the said building, which are made available for use by said tenants and their employees and some of which are made available for use by said tenants, customers and visitors, and in one or more of which are carried from time to time goods shipped to one or more of said tenants from points either within or outside the State of Pennsylvania, and from time to time goods produced by one or more of said tenants and eventually shipped by one or more of them to consignees either within or outside the State of Pennsylvania, as well as other goods, the sale and delivery of which are made at retail to the customers of certain of the said tenants in the portions of the building occupied by them for the conduct of their businesses. Defendant denies that said elevator operators or any other employees of the defendant are employed by the defendant for or are engaged in the handling of any of the goods belonging to or produced by the tenants of the defendant, whether shipped to said tenants or by them.

Defendant further avers that it engages, inter alia, persons who from time to time engage in the production

and generation of steam for the operation of said elevators, for the heating of said building and for use by or sale to certain of the said tenants for use by them (in the portions of the building occupied by them) for such purposes as such steam may be lawfully used by the said tenants within the provisions of said leases. The defendant also employs from time to time certain persons for the purpose of guarding and watching the building and its contents and for the purpose of maintaining and repairing the said building as and when the same may be required and also for the purpose of cleaning those portions of the building not leased to said tenants. Defendant however denies that any employee as an employee of the defendant is engaged in the maintenance and repair of machines, equipment and fixtures owned by or belonging to said tenants or in the cleaning of such portions of the building leased to said tenants.

Defendant is without knowledge or information sufficient to form a belief as to the extent to which at any given time or times since October 24, 1938, any tenant of the defendant in the said building was engaged in interstate commerce or in the production of goods for interstate commerce as distinguished from intrastate commerce or the production of goods for intrastate commerce and if such facts are material, defendant demands proof thereof at the trial of this cause.

Defendant, as the owner of the building described in the amended complaint, by leasing space in the said building to tenants over which defendant has no control and with respect to which it has no relationship other than to render service as a landlord in accordance with the provisions of the leases entered into with such tenants, is engaged in business exclusively within the City of Philadelphia, in the Commonwealth of Pennsylvania, and not otherwise, and none of the defendant's activities as such owner and operator of the said building, and none of the activities of its employees for which they are employed by

the defendant or for which defendant was liable to compensate such employees constitute, either directly or indirectly, interstate commerce or the production of goods for interstate commerce or processes or occupations necessary thereto, within the meaning of the Act, or otherwise.

VII. Denies the averments contained in paragraph VII of the amended complaint, except that defendant admits that during the period beginning October 24, 1938 and ending October 23, 1939, it paid to one of its employees engaged in and about said building to operate, maintain and protect the same, wages at rates less than twenty-five cents (25¢) an hour, and during the period beginning October 24, 1939 and ending with the date hereof, it paid to some of its aforesaid employees engaged in and about said building, wages at rates less than thirty cents (30¢) an hour.

VIII. Denies the averments contained in paragraph VIII of the amended complaint, except that defendant admits that during the period beginning October 24, 1938 and ending October 23, 1939, it employed certain of its aforesaid employees in and about said building for workweeks longer than forty-four (44) hours, and, during the period beginning October 24, 1939 and ending with the date hereof, it employed certain of its aforesaid employees in and about said building for workweeks longer than forty-two (42) hours, and did not compensate the said employees for their employment in excess of forty-four (44) hours during the period first above mentioned, or for their employment in excess of forty-two (42) hours during the period last above mentioned, at rates greater than the regular rates at which they were employed.

IX. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph IX of the amended com-

plaint, and if material, defendant demands proof thereof at the trial of this cause.

X. Dénies the averments contained in paragraph X of the amended complaint.

XI. Denies the averments contained in paragraph XI of the amended complaint.

AS FURTHER, SEPARATE AND ADDITIONAL DEFENSES IN LAW TO THE ALLEGED CAUSE OF ACTION SET FORTH IN THE AMENDED COMPLAINT:

XII. Defendant avers that the court lacks jurisdiction over the subject matter of the action.

XIII. Defendant avers that the complaint fails to state a claim against the defendant upon which relief can be granted for the reasons, inter alia, that it is vague, indefinite and insufficient, and has no foundation in the "Act" upon which said complaint is alleged to be based.

XIV. Defendant avers that it as well as its employees are exempt from the provisions of Sections 6 and 7 of the Act under the provisions of Section 13 thereof.

XV. Defendant avers that the "Act" described in paragraph I of the amended complaint is properly interpreted, is not applicable to defendant and/or to the employees of the defendant employed in connection with the operation, maintenance and protection of the premises described in the complaint.

XVI. Defendant avers that the "Act" described in paragraph I of the amended complaint if held applicable to the defendant and/or to the employees of the defendant employed in connection with the operation, maintenance

and protection of the premises described in the complaint, is unconstitutional as contravening Articles V and X of the Amendments to the Constitution of the United States and not within the power delegated to the Congress by Article I Section 8 clause 3 thereof, or by any other provisions of the said Constitution, or any amendment thereto.

Wherefore, defendant demands judgment against the plaintiff dismissing the amended complaint herein and for the costs of this action.

/s/ SIDNEY L. KRAUSS,
Office and P. O. Address,
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Philadelphia, Pa.

/s/ WM. CLARKE MASON,
Office and P. O. Address,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa.
Attorneys for Defendant.

Dated, April 26, 1940.

TESTIMONY.

Before Hon. William H. Kirkpatrick, *J.*

Philadelphia, Pa., November 15, 1940.

Present:

Ernest N. Votaw, Esq.,
Abner Brodie, Esq., and
Edward J. Fruchtman, Esq., representing the Plaintiff;

Sidney L. Krauss, Esq.,
Wm. Clark Mason, Esq.,
Frederick H. Knight, Esq., and
Martin P. Snyder, Esq., representing the Defendant.

PLAINTIFF'S EVIDENCE.

Arthur A. Chalker, having been duly sworn, was examined and testified as follows (Tr. pp. 33-46 inc.):

Direct-examination.

* * * (Tr. pp. 33, 34.)

By Mr. Votaw:

Q. Mr. Chalker, you are employed by the defendant, the A. B. Kirschbaum Company?

A. I am.

Q. In what capacity?

A. As cashier.

Q. How long—

A. And bookkeeper.

Q. How long have you been with them?

A. Since 1890.

Q. Since 1890, that was before they were incorporated?

A. Yes.

Q. Do you know when they were incorporated?

A. 1922; I believe, May 12th—or May 22nd.

Q. What are your duties?

A. To keep the books, send rent bills to our tenants at the end of the month, count the pay-roll and pay it to our ten or twelve employees.

Q. What are your hours?

A. From eight till four, five days a week. I don't come in on Saturday.

Q. And with how long for lunch?

A. An hour for lunch.

* * * (Tr. pp. 35-38 inc.)

Q. Mr. Chalker,—

THE COURT: It doesn't look to me as though there are going to be a great many facts here in this suit, really. I don't see why this suit should take a very long time, but go ahead.

By MR. VOTAW:

Q. —did you bring with you the leases with your tenants?

A. We have.

Q. Could you produce them, please?

THE COURT: Well, is that all necessary? It is admitted that they lease the building to a number of tenants. Can't you just tell us who they are?

MR. VOTAW: Well, I would like to have these marked for identification.

THE COURT: Well, what is the use, what is the use of loading up this record with things that are absolutely admitted, gentlemen? Let's not do it if you can avoid it.

Just tell us who your tenants are, Mr. Chalker. You know who they are.

THE WITNESS: I will read them off.

THE COURT: Yes, you read them off.

THE WITNESS: Atlas Ticket Company.

THE COURT: Yes.

THE WITNESS: Nicholas D'Alonzo, N:—N for Nathan—Feldman, Fishman and Tobin, J. B. Haber, Incorporated, Owl Advertising Company, Progressive Clothing Manufacturing, Irving Pincus and Brothers, J. Reed's Sons, I. and C. Shivak, Incorporated, Progressive Tailoring, Trading as Ridgway Sportwear Company.

By THE COURT:

Q. Now, were they all tenants on April 19, 1940?
A. Yes.
Q. And they were the only tenants of the building?
A. Only tenants.

THE COURT: All right.

By MR. VOTAW:

Q. There was one other tenant who has since removed. Lit Brothers was in the basement and has since moved out.
A. He has removed.

By The Court:

Q. Lit Brothers was in the basement on April, 1940?

A. Yes, but they removed, August 31st.

* * * (Tr. 40-44 inc.)

By Mr. Votaw:

Q. Perhaps it might be well at this time, Mr. Chalker, if you could describe this building to the Court so that the Court may have an idea of what it is like.

A. The Kirschbaum building Broad and Carpenter, was built in about 1902. It is a six-story building, 372 by 85—

The Court: Now, the defendant admits it is a six-story and basement building situated at the southeast corner of Broad and Carpenter Streets, in the city of Philadelphia, Pennsylvania, and that it was formerly occupied by the defendant as a factory for the production of men's clothing but it is now operated as a loft building.

That is what it admits. Now, is there anything you want to add to that that is of importance? Don't go over all that.

By Mr. Votaw:

Q. Well, where are the elevators and stairways situated?

A. The elevators are in what we call the outside part of the building—I mean, the stairways, rather, both at the north end of the building and the south end. There are two elevators at the north end of the building, and one in the rear of the building, at Washington Avenue.

Q. They are all on the east side of the building?

A. All on the east side of the building.

Q. And there is a stairway or a fire tower, is there not, in the middle of the building on the east side?

A. Yes, there are fire towers and stairways at the

Carpenter Street entrance, in the middle of the building, and also at Washington Avenue, east.

Q. Yes.

THE COURT: It would be very simple if we had a plan or a figure.

MR. BRODIE: I have, sir. It has some of my notes on it, but I will show it to counsel.

THE COURT: It may be that it is important to know where these elevators are and what they do.

MR. MASON: No objection to that.

THE COURT: All right, received in evidence as P-2.

(Plan of the building of A. B. Kirschbaum Company was marked Exhibit P-2.)

MR. MASON: I think we might note at that point, Mr. Votaw, that the stairways reach to all floors in the building.

By MR. MASON:

Q. Do they not?

A. Yes, sir.

MR. VOTAW: Cross-examine.

MR. MASON: No questions.

MR. VOTAW: That is all, Mr. Chalker.

WILLIAM MENTZEL, having been duly sworn, was examined and testified as follows (Tr. pp. 47-79 inc.)

Direct examination.

MR. BRODIE: May it please the Court, at the request of the defendant, and in order to avoid incon-

venience to it, we have agreed that witnesses will be produced in relays,—

THE COURT: All right.

MR. BRODIE: —and so it may be that we at one point or another might run out of witnesses.

THE COURT: Oh, that is perfectly all right.

MR. BRODIE: I hope that will not happen.

By MR. BRODIE:

Q. Mr. Mentzel, you are employed by A. B. Kirschbaum Company?

A. Yes, sir, I am.

Q. That company is the owner of a—

A. Kirschbaum.

Q. —factory building—

A. Yes, sir.

Q. —at Broad and Carpenter Streets, Philadelphia?

A. Yes, sir.

Q. How long have you been employed by A. B. Kirschbaum Company?

A. Well, I think it is about twenty or twenty-one years.

Q. In what capacity are you employed?

A. Well, I used to be a building mechanic and electrician, before I came from the Keystone Watch Case to the Kirschbaum Building. Then at that time they used to have about a hundred steam machines, and after they went out of business, well, then, they rented the building out.

Q. Just a moment, who went out of business?

A. Why, Kirschbaum.

Q. Well, you mean by that, do you, that they stopped manufacturing?

A. Stopped manufacturing.

Q. Clothing?

A. Clothing.

Q. But is it not a fact that they are still in business, operating this factory building?

A. As a loft building.

MR. MASON: I object to the form in which that question is put. Obviously, the witness does not run the Kirschbaum business,—

THE WITNESS: Well, they aren't in business at the present time—

MR. MASON: —and I think we might now have this distinction before us all. The question is that the Kirschbaum Company operates the manufacturing building. The Kirschbaum Company does do no such thing. The Kirschbaum Company, as counsel understands perfectly, is the owner of the building. The landlord rents the space, and does not operate any single industry in the building.

MR. BRODIE: Well, what Mr. Mason is saying is that he does not agree with our interpretation of the law applicable to this case.

MR. MASON: No, I am saying something more than that, I am saying something about facts, and not law.

MR. BRODIE: Well, the facts will be developed by witnesses and the Court can decide after the facts are in—

THE COURT: Well, that is right.

MR. BRODIE: —whether Kirschbaum operates a manufacturing building or not.

THE COURT: That is right, but it is agreed that Kirschbaum directly, itself, does not do manufacturing in the building.

MR. BRODIE: At the present time we will admit

that the defendant does no manufacturing in this building.

THE COURT: That is right.

MR. BRODIE: But we do not admit that the defendant does not operate this building.

THE COURT: That is right, I understand the point.

MR. BRODIE: Nor do we admit that the building is not a manufacturing building.

THE COURT: Yes, that is all right, I understand.

MR. BRODIE: Mr. Stenographer, will you read the last answer of the witness, please?

(The testimony was repeated by the reporter, as follows:

"Q. But is it not a fact that they are still in business, operating this factory building?

"A. As a loft building.")

By MR. BRODIE:

Q. How long has it been since A. B. Kirschbaum Company stopped manufacturing clothing in this building, Mr. Mentzel?

MR. MASON: Well, is that important, Mr. Brodie?

A. About nine years, I think.

MR. BRODIE: Well, if Your Honor please, I represent to the Court that this is a material line of testimony. Now, if Mr. Mason is so anxious to agree to everything it seems to me that he might as well agree to an injunction. This is a material element of our case, and I make that representation.

THE COURT: Well, it is only one question and it isn't worth arguing about, and I will receive it.

By THE COURT:

Q. They stopped manufacturing about nine years ago?
A. About that, Your Honor.

THE COURT: All right.

By MR. BRODIE:

Q. And you worked for A. B. Kirschbaum while it was manufacturing—
A. I certainly—
Q. —in the building?
A. I certainly did.
Q. When did you become an engineer?
A. About—as soon as they give up the business, then I had to get my license, and be in the engine room as engineer and building mechanic at the same time.

* * * (Tr. pp. 51-57 inc.)

Q. Since you have become an engineer what have your duties consisted of?

A. Well, my duties is to come in the morning, blow down the boilers, see that the mud is out, and see that they got the right amount of water in the boilers, see that those boilers are cleaned out every two months, and pack my pumps, keep my pumps in repair, see that the elevator pump is in good condition, watch the elevator rods, because they leak sometimes, take care of a hundred toilets in the Kirschbaum building, and other repairs sometimes I have to do for the tenants.

Q. What kind of pumps do you take care of?

A. Well, I take care of the elevator pump, hydraulic pump, that is one hundred and twenty-five pounds pressure, then I see that the fire pump is taken good care of, and the vacuum pump that is for the heating system, returning water back to the heater, for our boilers to get hot water; then I have a sewer pump, have to be blown down, that takes the excess water and pumps in the sewer,

we aren't allowed to have hot water blow right in the sewer, we have to let it blow in the well, and then pump it out in the sewer, then we have a boiler feed pump, which supplies the boilers the amount of water we want, in case we have a breakdown we change over to the sewer pump, then we have a house pump for drinking water, which supplies all toilets and the drinking water and the ice coolers through the building.

Q. And what force operates these pumps?

A. Well, at ninety pound pressure.

Q. Steam pressure?

A. Steam pressure, ninety pounds.

Q. Where is that pressure generated?

A. In the boiler room, by two boilers.

Q. Who takes care of those boilers?

A. Well, we have a fireman there that takes care of those boilers. There is three shifts, eight hours to the shift.

Q. What duties have you in connection with those boilers?

A. Well, I have got to see that the steam is up and that everything is running O. K., that the place keeps running.

* * * (Tr. pp. 59, 60.)

Q. For what purpose, apart from the operation of the pumps, is steam generated in these boilers?

A. Why, the elevator pump,—

Q. No, for what—

By The Court:

Q. What besides pumps—

A. Oh.

Q. —is steam used for?

A. Oh, for the steam machines, for all the steam machines through the building, steam irons and sponging machines.

Q. What do they do? What do those machines do?

A. Well, they press the clothing for the tailors in the tailor shop, like Progressive Clothing Company, Fishman and Tobin has steam irons, then D'Alonzo, then Pineus has machines, Haber has machines, Feldman, and I think that is about—and Mr. Spivak, I beg your pardon.

By Mr. Brodie:

Q. Do you know how many pressing machines there are in the building?

A. Well, that is hard for me to say, because I have—one time I was up there, there was about, over one hundred and forty. You will have to ask the chief engineer when he comes out. I don't go through the building and count those machines.

Q. How is steam supplied to these various machines?

Well, before I ask you that question, are these machines in the defendant's premises?

A. Absolutely, on each floor they have their own machines, and each one is their own—

Q. Will you describe to the Court how the steam is supplied to these machines?

A. Well, there is a riser, a steam main that runs up to the sixth floor from the basement, and those are branched off to each tenant on each floor, they have their own valves and supply their own steam. Some have traps, and there is one party that has no traps; that is the Progressive Clothing Company.

Q. Is the steam turned on and off daily, or is it continuous?

A. Well, at night, there is some of the tenants, like the D'Alonzo turns his off at night, and Fishman and Tobin turn theirs off then, on the fourth floor, the Government work, they turn those off, that make the Government uniforms, and the third floor leaves theirs on, because they have no trap system, there is about sixty machines stay on all night, except Friday night they are turned off until Monday morning.

Then there is Spivak, he turns his off, and Mr. Haber, and Mr. Pincus, and Mr. Feldman turns his off, except the third floor is kept on all night, because they have no steam traps at all on that floor.

Q. At what pressure is that steam supplied to the tenants?

A. At ninety pounds.

Q. Is that the usual pressure at which steam is generated in a steam heating plant, or is that an unusually high pressure?

A. No, that is the regular pressure we have for the pumps and for the pressing. We daren't have lower than that, because if they draw water you can't press a suit, and having water in your steam, it would bring the coat up. It has got to be absolutely dry, as dry as you can get it.

Q. And is it, therefore, necessary to have steam at a pressure of at least ninety pounds?

A. Yes.

Q. In order to make it effective?

A. You have got to have ninety pounds there. We always have the charts to keep it, in case they kick, we show them, we have a chart there, it is ninety pounds, unless their trap sticks on the floor and they don't by-pass the water.

Q. Do you know for what other purposes steam is generated?

A. Well, they sponge, on the sponging machine, like the Progressive, they have a sponging machine, and Haber, Mr. Haber, has a sponging machine, too.

Q. Do you know what the function of the sponging machine is?

A. Well, they have about an inch pipe—that is hard to tell—

Mr. Mason: Just a moment,—

The Court: Have you got somebody else that operates these machines?

MR. BRODIE: Well, I will bring that out by the tenants.

THE COURT: All right.

MR. BRODIE: All right, sir.

By MR. BRODIE:

Q. Is there any other purpose for the steam that is generated by your boilers?

A. Well, for the engines, to run the engines in the engine room.

By THE COURT:

Q. Run the engines for what, the elevators?

A. No, these are hydraulic elevators, Your Honor.

Q. What are the engines—

A. They are run to supply electricity to the tenants.

Q. Oh.

By MR. BRODIE:

Q. Is that electricity which is generated, I mean, is that a direct current or alternating current?

A. Direct current.

Q. Do you know for what purpose it is generated?

A. Well, it is generated for two of our tenants, like Mr. D'Alonzo—

By THE COURT:

Q. No, but what do they do with it?

A. Well, they use only lights, they have all the lights on the sixth floor, we have a throw-over switch there, for this electricity, Your Honor, to the direct current, and there is one motor that Mr. D'Alonzo has, a three and a quarter horse power, he runs that for a line of sewing machines, then he has no meter up there, but then Mr. Spivak has a meter, which they charge him for motors and lights.

Then we supply our basement and the toilets up to the second floor with our lights, and we used to supply Lit Brothers, but they moved out.

By Mr. Brodie:

Q. Does the electricity generated in the building supply the lights in the elevators?

A. They do, and the stairway.

Q. Now, what other purpose is steam generated for?

A. Well, the steam for all our pumps.

Q. Yes.

A. What I mentioned.

Q. How is the building heated?

A. That is heated by the exhaust steam from our engine, that comes—exhaust that goes in the heater and up through the riser, goes through the heating system, and the water condenses and is pulled back through the vacuum pump, and the hot water thrown in the heater, that we can use. The hotter water we get for the boilers, the better it is. That saves us coal.

Q. Well, your answer is that the building is heated by the steam—

A. Steam.

Q. —which is generated in these boilers?

A. But if we haven't enough in the cold weather we turn the live steam valve on.

Q. And what force runs the elevators?

A. Well, one hundred and twenty-five pounds pressure, water, on the hydraulic elevator pump.

By The Court:

Q. I was going to say, how do you get the pressure in the water?

By Mr. Brodie:

Q. How was that pressure generated?

A. That is from a hydraulic pump, from a hydraulic pump. We have a tank where the water is in, and that pumps up in another tank, which creates a pressure, then we have to pump air in it once in a while to keep air on top of the tank.

By The Court:

Q. What runs the pump?

A. The steam.

By Mr. Brodie:

Q. Do you know how many elevators there are?

A. There are three; two on the Carpenter Street entrance, one passenger and one freight, and one on Washington Avenue is one, freight.

Q. When Kirschbaum was operating in this building do you know how many elevators there were there?

A. Three.

Mr. Mason: That is subject to my objection.

The Witness: Three, the same thing.

Mr. Mason: My general objection.

By Mr. Brodie:

Q. Were they the same elevators?

A. Same elevators.

Q. Apart from the generation of the steam, which is under your control, do you have anything to do with the elevators?

A. Well, I have got to take care of them, pack the cylinders when they sink, and I have got to take care of any elevator that sticks on the floor, I have got to see what is the trouble, or the interlocks on the elevator, see that they are running.

Q. What do you mean by packing the plungers?

A. Well, I have got to take—see, it is up to the

safety device, of the elevator inspector, to see that these elevators don't sink. Well, if an elevator is on the floor, and that elevator would sink while the man is standing outside, she will go below the floor, and if she sinks somebody is liable to step in there and get injured, so it is up to us to keep those elevators on the floor. You have got to pull packing out and pack it. It takes about seven rings. I pack it about every five months or six months.

Q. Is or is not the packing of the plungers essential to the effective operation of the elevators?

A. Oh, it is, you have got to have the packing there.

Q. And do you do anything else in connection with the elevators?

A. Well, I help the tenants out once in a while, when they call me up, look at a motor, or light, or steam machine, sometime.

Q. No, I am referring now to the elevators.

A. Oh, well, that is all we can do. I don't put the cables on. That is up to the elevator—Otis Elevator Company.

Q. Are the cables renewed periodically?

A. They are when the inspector condemns them and he thinks it is proper to have new cables on, it is up to the company to have new cables put on the elevators.

A. Has there been anything else done to the elevators recently?

A. Well, we had safety gates put on it, three safety gates put on it.

Q. What other repairs do you make generally around the building?

A. Well, I have my one hundred toilets to take care of, and the spigots in the washrooms, and the heating system. Sometimes there is a leak on the floor, something like that; just keep everything in repair and running.

Q. Do you have anything to do with the sprinklers?

A. I do.

Q. What do you do?

A. Well, I have got to take care of the sprinkler tank, see that the sprinkler tank is full, and the fire tank in the yard is full, the suction tank, and if the sprinkler leaks, I have got to take a head off and put a new head on the sprinkler, and turn on the water again, and put the seal on the valve.

Q. Do you have anything to do with the radiators by which the various premises are heated?

A. I have.

Q. What do you do with those?

A. Well, I have got to see that the traps are working. Sometimes those traps stick, and they get a little rust in, and then I have got to take them apart and clean them out and see that they are running O. K., get the suction for the heating system.

Q. Have you ever had occasion to move any radiators around?

A. I have. I have taken—put three in the Atlas Ticket Company, took two out of Jacob Reed's, and repaired two up, made two radiators up.

Q. Do you know for what purpose you moved these radiators around?

A. Well, they were—the other ones were all out of commission, so I had to take them out, disband them and put these new ones in there. They were pretty well—

Q. Well, I will put it this way, was it or was it not to suit the convenience of the particular tenants?

A. It was to suit the tenants, where they heat the place.

Q. Do you or do you not know whether all the tenants in this building are engaged in manufacturing?

A. They are all engaged in manufacturing. There is one, I think, one contractor is Mr. Feldman, I believe, I am not sure, he makes—has contract work.

Q. Well, by contract work, what do you mean?

A. He is given—has coats by contracting, just making the coats and shipping them out again.

Q. But does he do the making, the manufacturing?

A. On the coats, yes, he makes them.

Q. On these premises?

A. You are right, there, because it is some contract work, you know. I am not through the building so much.

Q. What man works with you, Mr. Mentzel?

A. Well, there is only the fireman and I, we both work together. If I leave the engine room I tell him to watch the engine while I am out. See, I got to leave sometime.

Q. What is his name?

A. McKinley, Eddie McKinley.

Q. Do you mean McKinley Edwards?

A. That is it, McKinley Edwards, I beg your pardon, I made a mistake.

Q. Are there any other firemen that work with you?

A. There is Pete Rocca, and Pete Rocks. There is two Petes, see.

* * * (Tr. pp. 71-75 incl.)

Cross-Examination.

Mr. Mason: I don't think there is much to ask this witness, except to clarify one phase of his testimony, probably.

By Mr. Mason:

Q. Mr. Mentzel, you testified that as engineer—

A. Yes.

Q. —you were in charge of producing steam?

A. Yes.

Q. Now, steam has been referred to here as live steam—

A. Live steam.

Q. —and exhaust steam.

A. Exhaust steam, yes, sir.

Q. And just to make it perfectly clear, so we will

know what we are talking about, in so far as your testimony is concerned, will you tell us what use is made of the exhaust steam which is produced in the building under your engineer's job?

A. Well, that I told them, that exhaust steam is used in the heating system, through the steam radiators, and brought back again through the condensing pump, and throwing that hot water in the heater again, then pumping that hot water into the boilers, then if we haven't enough in the cold weather with exhaust steam, we turn some of the live steam on.

Q. All right. Now, then, what do you use the live steam for?

A. Live steam for all the pressing machines, the engines, and the pumps.

Q. All right, when you speak of the engine, what engine are you talking about?

A. That is what generates electric for the tenants.

Q. All right.

A. For them two tenants.

Q. Now, you say you generate electricity?

A. Yes.

Q. You generate electricity to light the building, do you not?

A. Just our part in the basement, and the stairway and the elevators.

Q. Well, the whole building?

A. Not the whole building.

Q. Why not?

A. No, because they are tenants, they get their own power, some of the tenants have their own power, only D'Alonzo—

Q. Where do they get that?

A. They get that from the Philadelphia Electric.

Q. Oh, then there is another source of electricity than the engine which you operate?

A. That is just the direct current.

Q. I see.

A. The Philadelphia Electric supplies A. C. in there.

Q. I see.

By The Court:

Q. You only supply two tenants with electricity?

A. Yes.

Q. Do they also get electricity from the Philadelphia Electric?

A. They have, yes, double, a throw-over switch.

Q. Those two tenants?

A. Yes, they have a throw-over switch, I put one for Mr. D'Alonzo, throw-over switch, throw-over, see, at night, he uses from eight o'clock in the morning until five or ten minutes after five in the evening, when he sees it is ten minutes after five he will throw over his switch and use the Philadelphia Electric. And I throw Mr. Spivak's switch over when they do that.

Q. Why is that?

A. That is a double, throw-over switch, see?

Q. Why don't they take it all from the Philadelphia Electric?

A. I think it is cheaper, they get it cheaper, see?

The Court: All right, go ahead.

Mr. Mason: That is all, I just wanted to clarify that.

The Court: That is all.

Re-direct-examination.

By Mr. Brodie:

Q. Just a few questions, Mr. Mentzel. Do you know whether the current supplied by the Philadelphia Electric is direct current or alternating current?

A. Alternating current.

Q. Do you know whether or not alternating current can operate direct current motors?

A. No, it couldn't, unless it was a universal motor, special motor made up for that, universal.

Q. There has been some reference to exhaust steam. That exhaust steam which you referred to is part of the steam which is generated as live steam, isn't it?

A. Live, yes, that is the exhaust from the engines, pumps.

Mr. Brodie: No further questions.

Mr. Mason: That is all, thank you.

George Simon, having been duly sworn, was examined and testified as follows (Tr. pp. 79-92 incl.):

Direct-examination.

By Mr. Votaw:

Q. Mr. Simon, you are employed by A. B. Kirschbaum Company?

A. Yes, sir.

Q. How long have you been employed by them?

A. Well, I would say about seventeen or eighteen years.

Q. And what is your work with Kirschbaum's now?

A. Why, running the freight elevator.

Q. Which freight elevator do you run?

A. Up at the Carpenter Street end.

Q. And when does that start in the morning?

A. Eight o'clock.

Q. And when does it stop in the evening?

A. Six.

Q. And is it used for anything but freight?

A. Well, in the morning I carry up—it is passenger

and freight too, you know, I carry up passengers. That is, well, about quarter after eight, I get them up. That is to help the passenger fellow to get them up.

Q. Who are these passengers?

A. Different people works in the building.

Q. They are the people that work in the building?

A. Work in the building.

By The Court:

Q. Which elevator do you operate?

A. The freight elevator.

Q. Freight.

By Mr. Votaw:

Q. On the north end.

A. North end.

The Court: Oh, north end, all right.

By Mr. Votaw:

Q. Now, how long a time did you—in the morning—did you take up these passengers and employees?

A. Why, from eight until about quarter after eight.

Q. I see, and is it used for passengers at noon time?

A. I take down about two or three loads, about—about five or ten minutes, that is all, and then in the evening it is used again.

Q. In the evening?

A. From five until about quarter after five.

Q. Now, what kind of freight comes in on that elevator?

A. Well, there is cloth comes in from different floors, linings, stuff like that.

Q. How is it packed?

A. Well, there is some of it in bundles, and some of it is in cases.

Q. What is the range in weight, these various packages?

A. Well, I couldn't tell you, I don't handle that. The only thing, I ask the party if it is—if I think it is too heavy to take up, just to show me the bill, let me know the weight, and then I know what I am doing.

Q. Well, what would those weights be on the bills?

A. Well, some of them weighs around—if it is canvas or stuff like that, it runs around seven hundred to a thousand pounds.

Q. What kind of a package would that be in?

A. That would be in a case.

Q. In a case, wooden case?

A. Wooden case.

Q. How often does the freight come in?

A. Well, it ain't—it don't seem to be much coming in now. Some days we are pretty busy. Other days just switch around the opposite way.

Q. I see. Are there any days when none is coming in?

A. No, there is always some comes in.

Q. Always some coming in. Now, do you put the freight on and off the elevator?

A. No, sir, I don't.

Q. Who does do that?

A. The truck driver. He puts it on, takes it off. I just take him up.

Q. I see. The truck driver goes up with the freight?

A. He goes up with the freight.

Q. And takes it off. Now, how about outgoing freight?

A. Same way.

Q. Is there some going out every day?

A. Some going out every day.

MR. MASON: Going up every day?

MR. VOTAW: And out, out every day.

By Mr. Votaw:

Q. And what type of packages does it go out in?

A. Well, there is sometimes, they have a large order, they send some suits out in cases, and then other times in large cartons.

Q. Are there any of the tenants who send out packages regularly, at a particular time in the day, every day?

A. Well, Fishman and Tobin, they send out their freight pretty near the same hour every day.

Q. About what time?

A. Well, about half-past three, I guess, around there. And then they might pick up a few—same fellow calls from there, he takes from the third, well, they might have a couple of cartons, too, to go out.

Q. I see, and what size packages would these be?

A. Well, it ain't always the same size. Some of them is small, like one suit in some of them, maybe might have a half a dozen suits in them.

Q. Are there packages such as could be carried downstairs?

A. I don't think they could. They are a little too heavy.

Q. Does any clothing ever go out on racks?

A. The only clothing goes out on racks, there might be a few coats go out from Jacob Reed, like, Jacob Reed's, on the first floor there.

Q. What is a rack like? Can you describe a rack?

A. Well, it is just a couple of pieces of pipe, like three-quarter pipe, with a top piece, and then rollers on the bottom, and they hang the coats on with hangers, see.

Q. About how long would it be?

A. Oh, well, they are different lengths. Some of them is longer than others.

Q. Could they be carried out?

A. No, sir.

Q. Does it ever happen that more than one truck gets there at the same time?

A. Yes, there is more than one truck sometimes gets there. Two or three may sometimes get in the yard at one time.

Q. How do you tell which to take up first, then?

A. The first ones there.

Q. First come, first served?

A. First come.

Q. Do the trucks wait while—

A. Oh, yes.

Q. —the freight goes up?

A. They wait.

Q. And they wait while the driver goes up to get freight?

A. Yes, they wait, without it is too long, he is up there for a good while, and then I will come down and pick the other one up.

(Tr. pp. 85-87 incl.)

Q. Now, what is the size of the loading platform on the ground floor?

A. Well, I couldn't exactly tell you. I guess it is a platform pretty near the size of that jury box there (indicating).

Q. Is it enclosed at all?

A. Well, it is just one part of it, there is a top over it, and just one end is closed in.

Q. It couldn't be used for storage there?

A. No.

Q. What type of truckmen come?

Mr. Mason: What is their color?

A. What do you mean, what concern?

By Mr. Votaw:

Q. Yes, what concern.

A. Well, it is Pennsylvania Railroad, Scott Brothers, Lippincotts, and different places, firms, like that, truck drivers.

Q. Do you know where they come from?

A. No, I don't.

Q. Do you recall any time when the elevators were shut down for any reason?

A. How is that?

Q. Do you recall any time when the elevators were shut down?

A. The only time they were closed a while, that was—one of them was running, the other was closed—was when they were putting on those safety gates.

Q. I see. Did that have any effect on the—

A. No, sir.

Q. —volume of traffic?

A. No, that didn't have effect.

Q. You say you were employed about seventeen or eighteen years by Kirschbaum?

A. About seventeen or eighteen years.

Q. That goes back to the time when they were manufacturing?

A. Manufacturing.

Q. Clothing?

A. Yes, sir.

Q. Were you also an elevator operator at that time?

A. No, I was—when Mr. Mentzel was in the shop, I was in the engine room for a while.

Q. I see.

A. Just took care of the engines.

Q. I see. Now, at that time, when Kirschbaum was manufacturing clothing, were the elevators used for transporting freight up and down?

A. Oh, they had to fetch their own stuff up and down.

Q. I see.

A. Get their own stuff out.

By The Court:

Q. Was the use substantially the same as it is now?

A. Yes, sir, on the same order.

By Mr. Votaw:

Q. Do you take anything besides freight down on these elevators?

A. Only passengers, only machinery, like if there is a person moving in or coming in, or moving out, of course, we got to take that down for them.

Q. Is rubbish removed by these elevators?

A. Only at this end where I am at, there is only two floors, that is, the second and Jacob Reed, but then there is always a man pushes that on and he takes it off, and takes it back to the back end.

Q. In the morning are you able to take the passengers up as fast as they arrive?

A. Well, don't take so long to get them up, according to—they generally come in different times, you know. If they all come in at one time, of course, it jams us up a little, but don't take long to get them up, both elevators.

Q. Do some of them have to wait?

A. Some of them have to wait their turn, until they get on.

Q. Do you stop at all floors?

A. No, I only take the third and fifth. The passenger, he stops at all floors.

Q. I see, you only take the third and fifth?

A. Third and the fifth.

Q. Would you ever have to skip the third because you were full up from the fifth?

A. Oh, yes, I had that, because sometimes the third wasn't over there to get on, and I had a whole load for the fifth, so I went right up to the fifth.

Q. Do you do anything besides elevator work now?

A. Yes, I watch on Saturdays, and on Sundays, one Saturday a month I watch, and then one Sunday a month.

Q. What time Saturday?

A. Well, if I am on a Saturday watching it is from three till five.

Q. And on Sunday, watching?
A. On Sunday it is from seven till five.
Q. What do you do when you are watching?
A. Have to walk through the building and ring clocks.
Q. Where are those clocks?
A. On the different floors, clocks on every floor.
Q. What position on the floor?

THE COURT: Well, now, would you advise me as to the theory on which that is material, what position the watchman's clocks are on the floor?

MR. VOTAW: Well, I didn't want to ask him whether they were inside the premises of the tenants. I thought I could get at that by asking him a non-leading question.

THE COURT: I know, but then what?

MR. VOTAW: I want to develop that he had to go through the tenants' premises and watch the whole premises, not only just in the hallways.

THE COURT: Well, why don't you ask him?

By THE COURT:

Q. Do you watch tenants' premises as well as the hallways?
A. Yes, I go right through the floor where they are at.
Q. All right.
A. One at each end, a clock at each end.

THE COURT: All right.

By MR. VOTAW:

Q. Do you have to watch for windows that are open?
A. Oh, yes.
Q. Radiators that leak?
A. Yes.

By THE COURT:

Q. Well, you do whatever a watchman does?
A. Yes.

THE COURT: We all know what that is.

MR. MASON: In fact, he has been there so long he does it well.

By MR. VOTAW:

Q. Just what is it that a watchman does? That is just what we are trying to find out. Just what is it that a watchman does?

THE COURT: Well, I know what a watchman does. Don't go into that. So does the Supreme Court.

MR. MASON: Maybe some of those that will be there when this case gets there won't know what a watchman does.

THE COURT: All right.

MR. VOTAW: Cross-examine.

MR. MASON: No questions.

HARRY GALLAGHER, having been duly sworn, was examined and testified as follows (Tr. pp. 93-100 incl.):

Direct-examination.

* * * (Tr. p. 93):

By MR. VOTAW:

Q. Mr. Gallagher, you are employed by the defendant in this case?
A. Yes.
Q. A. B. Kirschbaum Company?

A. I am.

Q. How long have you been employed by them?

A. Since 1934.

Q. During the latter part of 1938 and first part of 1939 what was your employment?

A. Well, was a porter.

Q. Porter?

A. Yes.

Q. Now, as porter what did you do?

A. I attended to all the toilets—lavatories, I meant to say—clean windows, and watch, when the watchman was off I took his place, once a month.

Q. Once a month?

A. Yes, and then I work in his place when he is off at night, or, for weeks, I worked ninety-eight hours a week.

Q. Now, did you have anything to do with the elevators at that time?

A. Oh, yes, I was working on the elevator, only relief man.

Q. I see. What did that work consist of?

A. Why, from twelve o'clock to one-thirty.

Q. And what did you do from twelve to one-thirty?

A. Relieving the man to go to lunch.

Q. Just on one elevator?

A. No, three of them.

Q. I see, half an hour on each?

A. Half an hour on each, yes, sir.

Q. And what has been your employment since the latter part of 1939?

A. Well, I done watching for—and I run the elevator.

Q. You run the elevator. Which elevator do you run now?

A. The Carpenter Street elevator, passenger.

Q. The passenger elevator at Carpenter Street. That is what you have been doing now?

A. Yes, sir.

Q. And what type of passengers ride on those elevators?

A. Just the employees, and there are salesmen.

Q. Employees and salesmen; employees of whom?

A. Of the different ones in the building.

Q. Of the different ones in the building. Are there any customers, also?

A. Why, yes, people comes up to D'Alonzo's, after suits, and brings them down.

Q. And the tenants themselves, I suppose—

A. Yes, the tenants.

Q. —use the elevators. Now, how frequent is the use of those elevators?

A. Oh, I am up and down every—every second, I guess.

Q. Up and down all the time?

A. All the time.

Q. Are there any particular rush hours?

A. Well, around twelve o'clock, in the mornings, and in the nights, coming out.

Q. Then you have the freight elevator alongside of you to help?

A. Yes, sir.

Q. Are you able to take them up and down as fast as they congregate?

A. Well, they time me in about a minute or minute and a half.

Q. Now, do you go to all the floors at these rush periods?

A. Well, sometimes I go past floors, if I don't have nobody to go off the floor.

Q. Is there any rule about floors which can use the elevators?

A. What?

Q. Is there any rule about the floors which may use the elevators?

A. Well, the fifth floor, the sixth floor and all the floors can use them.

Q. Can the employees on the first three floors use the elevators?

A. Well, no, sir.

Q. They can't? Why not?

A. Well, the only ones use it is pinkers, going upstairs, that is the only one that uses the elevator.

Q. Well, why is that?

A. They go up to D'Alonzo to get the stuff made up, they take clothes up there.

MR. MASON: I can't quite hear you. Will you lift your voice a little bit?

THE WITNESS: I say, they take clothes upstairs to be made.

MR. MASON: I didn't get that. What was that?

THE COURT: Take clothes upstairs.

THE WITNESS: Yes, the pinkers takes clothes upstairs.

THE COURT: "The pinkers takes clothes upstairs."

MR. MASON: I see.

THE WITNESS: Up at D'Alonzo's.

MR. MASON: I thought it was something important.

THE WITNESS: No.

By MR. VOTAW:

Q. Was there any period when the elevators were closed down, that you remember?

A. Only, when they pack them and put the gates on, that is all.

Q. When they pack them and when they were putting the gates on?

A. No, I said when they was packing it and put the gates on.

Q. Yes.

A. Safety gates.

Q. Yes. Did you ever have to do any extra elevator work for the tenants?

A. Yes, I work on Saturday afternoon after three o'clock for the Progressive Clothing Company.

Q. Is that regularly every Saturday or only occasionally?

A. No, two Saturdays in a month?

Q. Two Saturdays in a month?

By The Court:

Q. They pay you for that?

A. Yes, sir.

By Mr. Votaw:

Q. What type freight goes up these elevators and down?

A. Well, I don't take no freight up on my car, I have passengers.

Q. You don't on your car?

A. I just run the passengers.

Q. When you were acting as relief elevator operator, in the early part of 1939, on the freight elevators, at noon time, was much freight going up and down then?

A. Well, every once in a while, I would go up and down with a package, or, say, for the third floor, lining, they put that on a truck and took it upstairs.

Q. And what type packages would they be?

A. Well, just bundles they put on the truck and push it on the elevator and take it upstairs, and push it off.

Cross-examination.

By Mr. Mason:

Q. I just want to be correct, Mr. Gallagher. As I

understood your answer to counsel's question, it was that on Saturday afternoon—

A. Yes, sir.

Q. —you frequently work overtime for the tenants?

A. Yes, for the Progressive, yes.

Q. And they pay you?

A. Yes.

By The Court:

Q. Twice a month?

A. Well, I work on Sunday, and I do Saturdays in between that.

By Mr. Mason:

Q. Then sometimes during the week days after your regular work is done you work also for some of the tenants, do you not, sometimes?

A. I work for D'Alonzo, about an hour or so.

Q. Yes.

A. Two hours.

Q. And he pays you for that?

A. Yes, sir.

Mr. Mason: That is all.

Mr. Votaw: That is all.

Samuel H. Fleming, having been duly sworn, was examined and testified as follows (Tr. pp. 100-109 incl.):

Direct-examination.

Mr. Mason: You are calling the plaintiff for cross-examination?

Mr. Brodie: No, this is not the plaintiff.

By Mr. Brodie:

Q. Where do you live, Mr. Fleming?
A. 2424 South Watts Street.
Q. Where are you employed?

By The Court:

Q. Where are you employed, he says.

By Mr. Brodie:

Q. Where are you employed?
A. I am employed with A. J. Holman, now, 1224 Arch Street.
Q. Have you ever worked for A. B. Kirschbaum Company, the defendant in this case?
A. Yes, sir.
Q. Between what periods did you work?
A. I went to work for the--
Q. Defendant.
A. I went to work in the year of May 20, 1933.
Q. And how long did you work for the defendant? When did you quit?
A. I quit December 13, 1929.
Q. 192—you started in 1933?
A. Or 1939, rather.
Q. And what job did you have?
A. I was watchman.
Q. As watchman what were your duties?
A. Well, my duties, from five to seven, I was to stand in the yard.
Q. From five to seven in the morning?
A. In the evening.
Q. Or, in the evening.
A. In the evening.
Q. You came to work at five P. M.?
A. That is right.
Q. I see.

A. At 5 P. M. to seven I stood in the yard, I took all packages off the people coming out of the building, and also watched that no strangers came in the building.

Q. Well, just a moment, what do you mean by, you took all packages off people?

A. Passes, passes.

Q. Oh, passes?

A. Yes, see, when they came downstairs with a pass and a package I had to take the pass off of them.

By The Court:

Q. Permission to take the package out, is that what you mean?

A. Yes.

Q. It was something that allowed them to take packages out?

A. Yes.

Q. If they didn't have the permission you took away the package?

A. That is right.

The Court: All right.

By Mr. Brodie:

Q. All right, what else did you do at the gate?

A. Well, then I waited for the trucks to all get out of the yard.

Q. What kind of trucks?

A. Well, they were delivery trucks. Some were delivering goods and some was taking some goods out.

Q. Do you know to where they were making deliveries and from where they were taking goods out?

A. No, I couldn't tell you that.

By The Court:

Q. Well, large numbers of them were engaged in interstate commerce, weren't they?

A. That is right.

MR. BRODIE: Thank you, sir.

MR. MASON: If he knows what interstate commerce is—

THE COURT: Oh, all right.

MR. MASON: —he is a grand witness.

THE COURT: That is all right, surely.

By MR. BRODIE:

Q. Go ahead, what else did you do?
A. When the yard got empty, I closed the gate.
Q. Yes.
A. And by that time I had to start on my round.
Q. What did your round consist of?
A. Well, my round consisted of, when I went on the first floor, up through the building, I used to have to pull down and shut all the windows, I used to have to walk the fire tower.
Q. What else?
A. Take care of the toilets.
Q. What else?

By MR. MASON:

Q. What was that last? I didn't get that, take care of what?

THE COURT: Toilets.

A. Take care of the toilets.

By MR. MASON:

Q. Take care of the toilets?
A. Yes, sir.

By MR. BRODIE:

Q. What else?

By Mr. Mason:

Q. That is, the building toilets?

A. That is the building toilets, yes.

* * * (Tr. pp. 104, 105):

By Mr. Brodie:

Q. Proceed, Mr. Fleming.

A. Well, I took care of all the toilets in the building, and then I had to take care of all the pressing machines and the irons on the first floor.

Q. What do you mean when you say you had to take care of all the pressing machines and the irons?

A. Well, I had to see that there was no leaks, that the machine was—if the machine was shut down I had to see that it was shut down right.

Q. And these machines to which you refer, were they in the parts of the building—

A. That is right.

Q. —that the tenants occupied?

A. That is right, tenants, on the tenants' floor.

Q. And what did you do when you looked for leaks?

A. Well, I looked around the machine. If I seen any water, if the water was all over the floor, I would have to get down and wipe that water up and put a bucket underneath that machine.

Q. And what else did you do about leaks?

A. Well, if the leak got beyond my control I would have to shut the machine off.

Q. And what else was included in your rounds?

A. Then I would have to walk the fire tower down to see that there was no cigarette butts lit, close all the windows in the fire tower, then I would have to go downstairs, when I completed my round, I would have to go downstairs and let the people out.

Q. Let what people out?

A. The people that were working in the building.

Q. Could they not get out if you weren't there?

A. No, sir, they couldn't get out unless I left them out, because I had the keys in my possession.

Q. Did you have any other duties?

A. Well, I used to have to—I have two firemen work there, one man worked from four to twelve—I think that is what he worked, from four to twelve. The other man worked from twelve to eight.

Q. Did you have anything to do with the heat?

A. Yes, I had to turn the heat on in the morning, four-thirty, five o'clock, something like that, for the—for the tenants up through the building. I had—

Q. Where did you turn the heat on?

A. Down in the boiler room, and then up through the building, I had to turn it on, so many valves on each floor.

Q. How frequently did you make these rounds that you have described?

A. Every hour.

Q. Did that give you any time for leisure, or were you busy all the time?

A. Oh, I was—well, it took me approximately, I would say, forty-five, sometimes fifty minutes, to go through that building.

Q. During the hours when you were working as night watchman did you ever receive any packages?

A. Occasionally, yes, sir.

Q. For whom?

A. Well, I received for Tony Marino and for Mr.—

Q. Who was Tony Marino?

A. He was on the first floor. He isn't there now, I don't think.

Q. For whom else did you receive packages?

A. D'Alonzo.

Q. On what floor is he?

A. He is on the sixth.

Q. What did you do with those packages?

A. Well, I took Mr. D'Alonzo's up and put the package on his desk, and I took Tony Marino's merchandise and put it in his room.

MR. BRODIE: Well, subject to the Court's ruling regarding these witnesses' wages and hours I have no further questions.

THE COURT: Yes, all right.

MR. BRODIE: Cross-examine.

MR. MASON: No questions.

THE COURT: We will recess until two o'clock, then.

(Recess, 12.30 until 2 o'clock P. M.)

AFTER RECESS.

Present: Counsel as before noted.

PLAINTIFF'S EVIDENCE (Continued).

GEORGE EPPS, having been duly sworn, was examined and testified as follows (Tr. pp. 109-120 incl.):

Direct-examination.

By MR. VOTAW:

Q. Now, Mr. Epps, will you please speak up so that we can all hear you?

A. All right.

Q. You are employed by A. B. Kirschbaum Company?

A. Yes.

Q. How long have you been employed by them?

A. About ten or eleven years.

Q. And what is your job?

A. Elevator. Elevator.

Q. You operate an elevator?

A. Yes.

Q. Which one of the elevators do you operate?

A. The back elevator, freight.

Q. That is one on the Carpenter Street side?

A. Carpenter Street—Washington Avenue side.

Q. Washington Avenue side, that is my error. Do you do anything but operate the elevator?

A. Well, carry passengers, bring down trucks of dirt, and clean up the yard, and all.

Q. When do you clean up the yard?

A. On Saturdays, after—in the mornings, first thing in the morning.

Q. Saturday, in the morning?

A. Yes.

Q. Now, what do you do Saturday afternoons?

A. Watch the building Satu.day afternoons.

Q. You watch the building Saturday afternoons. Do you ever have any other watching?

A. On Sundays, every third Sunday.

Q. Every third Sunday. And what goes up and down on the elevator?

A. Cases of goods, all like that, coats, going out.

Q. How do the coats go out?

A. Some goes out on racks.

Q. Some go out on racks. Do you have any cleaning work to do besides sweeping the yards?

A. No, I hardly do any cleaning, only bale up paper during the time I run the elevator, in my spare time.

Q. Oh, in your spare time you bale paper?

A. Yes.

Q. Where does that paper come from?

A. Different floors, from each of the tenants on the floor.

Q. How do you get it?

A. They push it to the elevator, and I carry it down on the car, pull it in and carry it down.

Q. Down where?

A. To the basement.

Q. I see, and then you bale?

A. Yes, sir.

Q. Do you have to sort it?

A. Yes, I have to sort it.

Q. And what type packages come in and out on the elevator?

A. Well, some comes in cases. I don't know what is in them.

Q. Yes, who puts them on the elevator?

A. People who brings them there and those who receive them, they generally put them on.

Q. The receiver—

THE COURT: Well, gentlemen, may I ask, is it admitted that these cases the witness is now referring to, in many if not all instances, contain goods which have been or will be transported in interstate commerce?

MR. MASON: We couldn't admit it, sir, in reference to any particular witness.

THE COURT: All right.

MR. MASON: We have admitted as far as we can admit,—

THE COURT: All right, go ahead.

MR. MASON: —under the facts as we know them.

THE COURT: Well, all right.

MR. MASON: You see, we don't know that.

THE COURT: I thought I might be able to simplify that.

By MR. VOTAW:

Q. The truck driver then goes up with the freight?

A. Right.

Q. Or comes down with the freight?

A. Yes.

Q. Do you ever have to carry any freight just between floors in the building?

A. Yes, the Progressive.

Q. And what floors are these?

A. Third and fourth.

Q. Third and fourth?

A. Yes.

Q. Third and fourth, and does that occur regularly or just infrequently?

A. Well, mostly pretty regularly, on account of that Army contract they have.

Q. I see. What kind of material is that?

A. That is like war uniforms.

Q. I see. You mentioned clothing on racks. What tenant is that from?

A. That is from Feldman's.

Q. Feldman's?

A. And D'Alonzo.

Q. How many coats would be on a rack?

A. From twenty-five to fifty.

Q. Twenty-five to fifty, and where do the trucks unload to come into the building?

A. In the rear of the building, at the platform.

Q. Is that an enclosed platform?

A. No, it is an open platform.

Q. Open platform. Can you describe these racks that you speak of?

A. Yes, according to the ordef, like that one coats are hanging up on, only with wheels at the bottom.

(The witness indicated a rack in the court room.)

By Mr. Votaw:

Q. Wheels at the bottom?

A. Yes.

Q. Would they be as big as that one, as long as that one?

A. Well, they would be as long as that one.

Q. Could they be carried up and downstairs?

A. No, they couldn't be carried up.

Q. What time of the day do you carry passengers?

A. From seven-thirty up until near nine-thirty. Then I—

Q. In the morning?

A. Yes, in the morning, and then from twelve until one, at noon, and from five until I get them down at night.

Q. I see. Is there a rush of passengers at that time?

A. Yes.

Q. Who are those passengers?

A. They are employees of the building, on the fourth fioor and the fifth.

Q. Employees on the fourth and the fifth, and they keep you busy during those times?

A. Yes.

Q. Taking them out and in?

A. Yes.

Q. During those times can you carry any freight?

A. No, not then.

Q. Cannot?

A. Can't carry freight.

Q. Why not?

A. The car is loaded with people, so I make the freight wait.

Q. How much of this trash do you take down?

A. I take down a bit—a good bit of it from the fifth floor, at the most, from the fifth.

Q. You said you took it in trucks?

A. Trucks, and then bundles of paper, too.

Q. What is the size of these trucks?

A. They are a good size.

Q. About as high as this table, or higher?

A. Higher than that.

Q. Higher than that table?

A. Yes.

Q. Are they as big around, as big as the table?

A. Not as big as the table, but I would say half way.

Q. About half the size of the table?

A. Yes.

Q. And how many would you take down a day from the fifth floor.

A. Sometimes five and six trucks off of there a day.

Q. And you take those down in the basement?

A. Yes.

Q. And sort them?

A. Sort them.

Q. Do you have to run the elevator at the same time?

A. Same time.

MR. MASON: Well, now, wait a minute, you don't mean that, Mr. Votaw.

MR. VOTAW: Well, in between time.

MR. MASON: Well, you have asked the witness—I don't object to leading questions that are not unfair to the witness, but he doesn't sort this stuff in the elevator.

MR. VOTAW: I don't suppose so.

THE WITNESS: You have to—

MR. MASON: He isn't running the elevator at the same time he is sorting stuff. That was your question, and I hope you didn't mean it, because I am sure he does not.

By The Court:

Q. You don't, do you?

A. No.

By Mr. Votaw:

Q. You have to sort the stuff in between elevator trips?

A. Trips.

Q. And during the same period during which you are on the elevator?

A. Yes.

Q. What would happen if you didn't remove this trash?

A. Well, it could block up the fire escape or—

By Mr. Mason:

Q. What is that? I can't hear that.

The Court: It could block up the fire escape.

A. (Continued) Fire escape, or either start a fire if it lays around that way.

The Court: It could block up the fire escape or start a fire if it lays around that way.

Mr. Mason: Well, that is interesting, but I can't see just how this witness could give us any real answer to that question in the form he has given it. If Mr. Votaw wants to go ahead and explore it a little further—we don't know yet that this stuff was at the fire escape when he gets it.

The Witness: They put it in front of the elevator door and blocks it, and as I have got freight coming up and down, sometimes they have to wait until I get my spare time to go up to get it.

By Mr. Votaw:

Q. Where is the fire escape entrance with relation to the front of the elevator?

A. That is on the side.

Q. It is right on the side by the elevator?

A. Yes.

Mr. Votaw: Cross-examine.

Cross-examination.

By Mr. Mason:

Q. I am a little curious about this trash. You have aroused my curiosity, Mr. Epps. Is the trash you speak of trash that accumulates in the course of the day in various tenants' rooms where the work is going on?

A. Well, some of them tell me, they even take it down there, so much of it, and I am jammed up, I can't even handle it all at the same time, some of it has to stay up on the floor.

Q. That is, they want you to do it sometimes when you just can't do it, isn't that so?

A. I try to do all I can during that time.

Q. Yes.

A. But I can't do but one man's job.

Q. Well, now, the trash is something that is ordinarily cleaned up in the building, isn't it?

A. Yes.

Q. That is what you are talking about, and who cleans it up in the tenant's place, the tenant?

A. No, they have a porter there who sweeps the floor.

Q. What?

A. They have a porter who sweeps the floors.

Q. That is, the tenant does?

A. Yes.

Q. And he sweeps up the floor and the trash is col-

lected up, and then it is put together in a pile, or in a bale, as you call it, and carried down in the elevator as soon as you get a chance to take it down to the basement, where it is sorted out?

A. Yes.

Q. Is that correct. And it is composed of all sorts of stuff, is that right?

A. Yes.

Q. Newspapers and all kinds of things, and that is the reason you have to sort it out?

A. Yes.

Q. Mr. Epps, as I understand it, the tenants put this trash, we will call it, in the trucks, and you take the trucks down on the elevator?

A. Fellow sweeps up the floor, he puts it in the truck.

Q. He puts it in the truck?

A. He pushes it near the elevator.

Q. Yes.

A. And I pulls it on and takes it downstairs.

Q. That is it, and then when it gets down in the cellar you are one of those that helps to sort it out?

A. Yes.

Mr. Mason: Well, that satisfies my curiosity. That is all, thank you.

Mr. Votaw: That is all.

Nick Cattelise, having been duly sworn, was examined and testified as follows (Tr. pp. 120-126 incl.):

Direct-examination.

By Mr. Brodie:

Q. Where do you live?

A. 1221 Kimball. That is between Washington Avenue and Carpenter Street, on 12th Street.

Q. You are employed by A. B. Kirschbaum Company, the defendant in this case?

A. Yes.

Q. How long have you been employed by the Kirschbaum Company?

A. Why, 1940, 1940.

Q. What month?

A. The third of January.

Q. Where do you work?

A. Why, I am watching.

Q. Do you work at the Kirschbaum Building at Broad and Carpenter Streets?

A. Yes.

Q. What is your job?

A. Watchman.

Q. Day or night?

A. Why, I am going on twelve o'clock until seven in the morning.

Q. Twelve o'clock midnight until seven in the morning?

A. Yes, sir.

* * * (Tr. pp. 121-123 incl.).

Q. Your last statement, then, is that you are a night watchman?

A. Yes.

Q. Will you please describe for the Court just what your duties as night watchman consist of? What do you do?

A. What I do?

Q. Yes.

A. Why, when I start my time, going up the stairs and ring the clock, and go through the floor, and watch the windows, and watch all the pressing, go around the building, and if any leak, everything is O. K., I let them go and don't bother.

By The Court:

Q. Now, you say you go through the floor; do you go in all the rooms?

A. Yes, every room, every floor, I got to go every hour in the floor.

Q. All right.

A. And ring two clocks every floor.

By Mr. Brodie:

Q. Do you close windows if they are open?

A. If they are open I have to close.

Q. If there are any lights lighted in tenant's premises—

A. If there is any light is on, I put it out.

Q. What do you do about leaks in the pressing machines and other steam facilities?

A. Why, if there is a leak, why, I have to try to stop it.

Q. Do you do—

A. The best I can.

Q. Do you do anything about guarding against fires?

A. Well, I have to tend sprinklers, in case any go, I have to shut the valve, on my time.

Q. What valve?

A. I mean, if there is any water going down on the floor, I have to find out the valve it is on, to shut it off.

Q. Yes, but do you do anything about guarding against fires?

A. Well, at the present time ain't had no fires. In case we had any fires we have to put something on it.

Q. I am sorry, I didn't get the last part of your answer.

A. You can't wait until somebody else comes in.

The Court: Got to jump on it if you have a fire; well, part of your job is to look out for fires, is it?

The Witness: Well, I have to look in case of a fire.

THE COURT: All right.

By MR. BRODIE:

Q. Do you have anything to do with the turning on of the heat in the cold weather?

A. Well, I look around the valve, if any valve is shut, I have to open. If he is on, I don't bother.

Q. And do you ever stand guard at the gate?

A. Well, when I come in, my time in the evening.

Q. What time?

A. Five o'clock.

Q. At the gate.

A. Well, I watch the trucks go out, and that the peoples come up, from up the stairs, watch for any package, take them out, if they got any pass, then I take the pass, if not, take the package back.

Q. Have you been doing that same work regularly ever since you started to work—

A. Yes.

Q. —for the Kirschbaum Company?

A. Since I started that job, I do my duty.

MR. BRODIE: You may cross-examine.

MR. MASON: No questions.

MR. BRODIE: That is all, thank you.

MCKINLEY EDWARDS, having been duly sworn, was examined and testified as follows (Tr. pp. 126-137 incl.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Edwards?

A. 806 South 15th Street.

Q. You are employed by A. B. Kirschbaum Company, the defendant in this case?

A. Yes.

Q. How long have you been employed there?

A. Twenty-one years the 15th of September past.

Q. Doing what?

A. Fireman.

Q. Have you been fireman all twenty-one years.

A. Yes.

* * * (Tr. pp. 126-128 incl.)

Q. What do you do now? Do you have more or less work?

A. I have more.

Q. And what in addition do you do?

A. Well, now, I will tell you just what I have to do. When the engineer goes out, I will start there, first, when the engineer goes out, up through the building, to the tenants, to do jobs, I have to do his work, and that is watch the engine, oil it, oil the pumps, watch and keep it from running hot until he comes back. Then I have to pass my own coal, I have to unload coal cars. If I run short of coal down in the boiler room I got to go down to Washington Avenue and wheel it up and dump it in the coal car and throw it up, and when he fixes a pump I have to give him a hand, if he wants it.

Q. What pumps?

A. Well, the one is the house pump, that starts water up on the roof of the building, one is the boiler feed pump, one is the sewer pump, one is the vacuum pump, the fire pump, they don't run that much, and the elevator pump.

Q. Do you know for what purposes the steam that is generated in these boilers you fire is used?

A. Well, they presses with it, they sponges with it. That is about as far as I know.

Q. Who are "they"?

A. And they run the dynamo with it.

Q. Who are "they"?

A. Well, all of them presses.

By The Court:

Q. Who are they, when you say "they", who do you mean?

By Mr. Brodie:

Q. Who do you mean?
A. Why, D'Alonzo,—
Q. You mean the tenants in the building?
A. Yes, the tenants, yes.
Q. All of them use the steam?
A. Yes.

By The Court:

Q. Do they all use the steam?
A. Yes.
Q. All right.
A. They all use the steam.

By Mr. Brodie:

Q. How many of them use the steam for sponging, do you know?
A. There is two, as far as I know.

* * * (Tr. pp. 129, 130.)

Q. Is the steam which is generated in these boilers that you fire used for running the elevators?
A. Oh, yes.
Q. Is it used to supply heat to the premises?
A. Oh, yes.
Q. Do you know whether it runs the generators which generate the electricity which lights the building?
A. Oh, yes.

* * * (Tr. p. 130.)

Q. How many boilers do you fire?
A. Why, I fire two.

Q. And how many engines do you watch?

A. One.

Q. Is there anybody else who does work of a similar nature to yours?

A. Why, not at the same time that I does. After I get off, there is another man comes on.

Q. Who is that?

A. Why, that is a man by the name of Mr. Rocca.

Q. Is there any other fireman?

A. Yes, there is one comes on after he goes off, at twelve o'clock at night. His name is Pete Rocks.

Q. Does he do the same kind of work as you?

A. Well, not the engine, he don't do that, because that isn't running.

Q. How about work as a fireman?

A. He has to do everything I do, and watch the pumps.

Q. And Rocca does the same, too?

A. Yes, and he has to watch the engine, Rocca does, because he comes on at four o'clock, until it is shut down.

Q. And what time does the engine shut down?

A. Why, I was told here some time ago it is supposed to have been shut down at quarter after five.

Q. What engine are you referring to?

A. The one—

Q. The one that generates the electricity?

A. The ones that generates the electric.

Q. Do you know to whom electricity is supplied by the building?

A. Well, I know a couple, I won't say that I know them all, to be sure, but I do know a couple.

Q. Who are they?

A. Why, one is Mr. D'Alonzo.

Q. Yes.

A. And the other are Spivaks. One is on the sixth and one is on the second. Now, any other, I don't know of any other that uses the electric. If there are any, I don't know of any.

Q. At what pressure is steam maintained?

A. Why, I carries ninety pounds.

Q. Do you ever get any complaints from any of the tenants—

A. No.

Q. —regarding the steam?

A. No, not often; once in a great while.

Q. Do you ever?

A. Yes, once in a while.

Q. What are those, what is the nature, generally,—

A. Why, they comes down—

Q. —of those complaints?

A. Why, they comes down and says wet steam.

Q. Yes, what do you mean by wet steam?

A. Why, see, why, sometimes when I let the steam go down, or when the steam goes down, it is wet, it is damp, it isn't dry, see what I mean?

Q. Yes.

A. It wets the goods, but then all the time it isn't my fault, it is their fault, their traps—

Q. I haven't blamed you for it.

A. But I am just only telling you.

Q. I am just trying to find out what is the objection to wet steam.

By The Court:

Q. Why don't they like to have wet steam?

A. Why, that wets the goods and they don't press right, see?

Q. All right.

A. After they press, it wrinkles.

The Court: All right.

By Mr. Brodie:

Q. How do you keep track, or what method have you for knowing how much steam pressure you have?

A. Why, I have a gauge to watch.

Q. And do you have to watch that gauge fairly constantly to see that the steam is kept up?

A. Oh, yes.

Q. To the pressure?

A. Yes, sir.

Q. Does anybody else also look out for the gauge?

A. Why, when I step out the boiler room, I tells the engineer when I go out, and then he watches it, like if I go to the wash room, I always tell him.

MR. BRODIE: No further questions.

Cross-examination.

By MR. MASON:

Q. Edwards, as I understood it, you were a fireman—

A. Yes.

Q. —at this time, and your duties required you to be down where the engines and the boilers are?

A. Where the boilers are.

Q. Yes.

A. Not where the engines are.

Q. Yes. Do you have any duties at all that take you outside of the boiler room?

A. Oh, yes.

Q. And what duties are those?

A. Oh, that is going in the engine room to take care of the engine, when the engineer is out, that is to go down in the yard and wheel coal up, so I can fire the boilers.

Q. Yes. Now, what duties do you have as a fireman that requires you to go upstairs into the tenants' place of manufacture?

A. I don't go up there.

Q. Well, you told Mr. Brodie that you knew that they used the steam up there in their various machines. Did you ever go up and see it?

A. I have gone up, when I used to, when Kirschbaum ran it, I used to go up there.

Q. What?

A. When Kirschbaum was running it I used to go up there. I don't go up there now.

Q. No, but you told him that all the tenants, that you guess that all the tenants used this steam up in their various places?

A. Yes.

Q. Now, you didn't mean that, did you?

A. Yes, I mean they used it.

Q. Well, have you been there yourself to see it?

A. Up there? I know they use it because they have pressing machines up there.

Q. Have you ever been up there?

A. Not while they was operating, no, not while they was operating.

Q. You have never been up there at all?

A. Not while they was operating.

Q. And you have never been up there in the tenants' places in the building to see what they do with electricity, either, have you?

A. Oh, no, not while they was working.

Q. So that you—

A. Not while they was working.

Q. So you didn't mean to convey the impression which your answer did to Mr. Brodie, that you personally had been up there seeing them operate?

A. No, I didn't, personally, I didn't go up.

MR. MASON: That is all, I think, that is all.

Re-direct-examination.

By MR. BRODIE:

Q. Have you ever been up in the tenants' premises when they were not working?

A. When they were not working?

Q. Yes.

A. Yes.

Q. Have you seen pressing machines there?

A. Yes.

Q. Do you know, Mr. Edwards, how the steam is supplied to the upper floors of the building from the boilers?

A. Yes, it has got a six-inch main, I think—I won't be sure it is a six-inch—to all the way to the roof.

Q. Yes.

A. And it branches off on a six-inch main from the boiler room all the way to the roof, and then a smaller pipe branches off, goes to the different tenants.

Q. Smaller pipes branch off the line to go to the different tenants, you say?

A. Yes, from the six-inch main.

Q. And do you know what connections are made between the pipes and the pressing machines?

A. No, I really don't know just what connection that is.

Mr. Brodie: That is all.

Mr. Mason: No questions.

Charles Moetsch, having been duly sworn, was examined and testified as follows (Tr. pp. 137-152 inc.):

Direct-examination.

By Mr. Brodie:

Q. Where do you live, Mr. Moetsch?

A. 2529 South 17th.

Q. Are you employed by A. B. Kirschbaum Company, the defendant in this case?

A. Yes, sir.

Q. How long have you been employed by A. B. Kirschbaum Company?

A. Next April, twenty-five years.

Q. At the present time what is your job?

A. I am supposed to be superintendent and chief engineer.

Q. Well, are you, actually?

A. Yes.

Q. How long have you been superintendent and chief engineer?

A. I was chief engineer for the time being that I am in Kirschbaums, and twelve years I am superintendent.

Q. And under you do all the building employees work? That is rather an inverted sentence; do all the building employees work under you?

A. I have got twelve men working under me, yes.

Q. What are their jobs? Describe them by jobs.

By The Court:

Q. Twelve, is that?

Mr. Brodie: Twelve.

A. Three elevator fellows.

By Mr. Brodie:

Q. Yes.

A. Three firemen.

Q. Yes.

A. Two watchmen.

Q. Yes.

A. One engineer, a utility man.

Q. Yes.

A. One carpenter.

Q. Yes.

A. One helper.

Q. And one what?

A. Helper, carpenter helper.

Q. Is that twelve?

A. Oh, and one more, porter.

Q. One?

A. A porter.

Q. Oh, thank you.

A. Cleaner. That is twelve.

Q. How long has it been, Mr. Moetsch, that A. B. Kirschbaum Company has not operated a clothing factory in these premises?

A. '28, I believe, since 1928 we stopped.

* * * (Tr. pp. 139-141 inc.)

Q. Will you describe briefly the functions performed by each of the classes of employees that you have mentioned?

A. For instance, how the firemen—

Q. What do the elevator operators do?

A. They run the elevator up and down and take the pasengers off.

Q. Do they carry freight, too?

A. Yes.

Q. And how about the firemen?

A. The firemen fires the boilers and keep up their steam.

Q. At what pressure is the steam kept?

A. Between ninety and a hundred. It daren't go below eighty.

Q. Why not?

A. That is on account of the pressing machines, and the steam gets wet after it goes below eighty pounds. Between sixty and eighty the steam is wet.

Q. Yes.

A. And if it goes above eighty it is too dry. Now, eighty pounds is supposed to be on the pressing machines.

Q. How many pressing machines are there in the building to which steam is supplied, do you know?

A. Oh, I guess about a hundred.

Q. Is steam supplied for any other machines?

A. For—yes, for one sponging machine.

Q. Whose is that?

A. And several irons, what we call steam irons.

Q. Are the steam irons hand operated?

A. Yes.

Q. Or are they rather large machines operated by foot power?

A. They are—some of the irons is handled by foot power as well as by hand, you have to handle it by your hand, and put your foot on the pedal, if you want to put pressure on.

Q. I see. Now, how about the sponging machine, do you know just what the function of the sponging machine is?

A. Yes, sir, I have been with a good many of them.

Q. All right, will you please describe it to the Court?

A. Sure. The cloth comes in the factory and goes over the machine, over a roller, and the steam gets turned on, then it goes over the top, then another sponger, steam roller, then it goes on the outer side over another roller and there is steam on. Is that plain enough?

Q. Yes, and just what happens to the cloth as it passes over these rollers?

A. It shrinks. That is the idea of shrinking cloth.

Q. I see, so that, if I understand you correctly, what you are telling me is that the cloth cannot be cut and sold into garments until it is shrunk in this sponging machine, is that so?

A. I didn't say that.

Q. Well, is that so?

A. If you are going to have a suit that isn't shrunk, understand, you go in the rain and you are going to shrink.

Q. I see. Can the sponging machine be operated without the steam?

A. No.

Q. Now, these various persons—

A. Understand, pardon me one moment, there is dif-

ferent sponging machines, not only steam sponging machines.

Q. All right, I am talking about the one—

A. Oh.

Q. —in the building.

A. Yes.

Q. Can that be operated without steam?

A. No.

Q. Can the pressing machines which are in the building be operated without steam?

A. Why, all depends if the tenants—if they want to get their steam off us or not, then they have to make it themselves.

Q. But steam is essential for the operation of the pressing machines, is it?

A. Yes.

Q. Now, this same steam which is generated in the boilers, I understand, operates the elevators, too?

A. Yes, it operates the pump.

Q. Which operates the pump?

A. Which puts pressure on the water, it is hydraulic elevators, builds up the pressure, and this pressure carries the elevators up and down.

Q. Is it true, then, that if the steam were to fail the elevators would fail and the pressing machines would fail?

A. Yes, that all depends if the steam goes down below fifty pounds.

Q. Yes.

A. Then it would slack up.

Q. What would slack up?

A. The pump would slack up.

Q. The elevator pump?

A. The elevator pump, yes.

Q. And there wouldn't be sufficient pressure to operate the hydraulic elevator?

A. Yes.

Q. Is that so? Electricity, I understand, is also generated in that building, is that true?

A. Yes, a little bit.

Q. And that is done by dynamos down in the basement?

A. Yes.

Q. That electricity, is it direct or alternating current?

A. Direct.

Q. Do you know whether any of the motors in the building are operated on this direct current?

A. Yes, sir.

Q. Whose?

A. D'Alonzo Lancaster, three motors.

Q. Any others?

A. And on the second floor is five motors.

Q. Is electricity supplied for any other purpose?

A. We supply the electric to Spivak, on the second floor, and up on the sixth floor for these motors, three motors; few lights.

Q. Electricity is supplied for lights to the sixth floor?

A. Few of them, yes.

Q. How about the second floor?

A. Second floor got the lights and motors.

Q. How about your hallways and the elevators?

A. Sure.

Q. Is that done by outside current or house current?

A. After five o'clock at night we turn on the outside current, but from seven—half past seven in the morning up until five o'clock it uses the D. C. current.

Q. How long—

A. Which we operate.

Q. How long have these—or, how long has electricity been generated in the building?

A. Since the building is in existence.

Q. Have you ever had any complaints about the elevators?

A. What do you mean, complaints?

Q. Well, complaint that the service wasn't good enough, or complaint because an elevator wasn't running on a particular day when a tenant came in to do some work, have you ever had any such complaints?

A. No.

Q. Well, I will refresh your memory. Has Mr. D'-Alonzo ever complained to you about elevators?

A. Not that I know.

Q. Does the building also occasionally do repairs as accommodations for tenants?

A. Once in a while, yes, in the case of emergency we have to do it. Now, if you want me to explain, for instance, a case, I am going to tell you.

Q. Yes, what do you mean by an emergency?

A. All right, an emergency case is, for instance, in Jacob Reed's, on the first floor, there was not so long ago, he had a blowout on a reducing valve, gasket blew out, understand, he didn't know how to shut it off, the people were afraid to work there, and he sent for me.

"All right," I said, "I shut it off, then you are going to send for somebody else to put that gasket in", and I sent then my mechanic up, and he by-passed a reducing trap or reducing valve.

Q. That was on the steam supply line?

A. That was on the steam supply line.

Q. Did you ever do any other repairs around the premises?

A. Oh, yes, once in a while, for instance, in knocking a leg off a table, and they ask me if I would accommodate them, and I said, yes, I do it.

Q. You have a carpenter working there, haven't you?

A. Yes.

Q. What is his name?

A. Eli Gionto.

Q. G-i-o-n-t-o?

A. G-i-a-n-t-o.

Q. Does he makes repairs to windows?

A. Yes, sir.

Q. Does he replace sash chains?

A. Sure.

Q. Sash chains are similar to sash cords, are they?

A. Yes.

Q. Except that they are chains?

A. Yes.

Q. Instead of rope?

A. Yes.

Q. Does he make repairs to doors?

A. Sure, but only doors what belong to the building.

Q. Yes. He also does some painting, doesn't he?

A. Sure, when the floor is empty, for instance, then I put him on painting, if I have no other work for him.

Q. And he paints the common hallways, doesn't he?

A. Sure.

Q. And the staircases?

A. Sure.

MR. BRODIE: You may cross-examine.

Cross-examination.

By MR. MASON:

Q. You spoke of the dynamo in the building generating direct current?

A. Yes.

Q. Do you have any alternating current in the building?

A. Well, for us, yes, for our small—for instance, for the elevator bells and the lights and for the staircases, after five o'clock.

Q. Yes.

A. That belongs to us.

Q. Now, is there alternating current used in the building by any of the tenants?

A. Practically all the tenants got alternating current.

Q. Where did they get that?

A. From the outside, from the Philadelphia Electric.

Q. And there are two of the tenants, however, that still have the old direct current machinery?

A. Yes, during the day time, but if they work overtime, for instance, then they have for the light system, only, they have alternating current.

Q. I see, so that those machines, for instance, in D'Alonzo's place, he has got three of them—

A. Yes.

Q. —that use direct current?

A. Yes.

Q. If he changes those for a different type of machine—

A. No.

Q. —to use alternating—

A. He can't do that.

Q. What is that?

A. He can't do that, he shuts those three motors, they will be shut down until the next morning.

Q. I appreciate that.

A. He can't operate that.

Q. No, but it is only because they are that type of machine?

A. Yes.

Q. Yes, if they were a machine type that carried, that used the alternating current, he would get it from the Philadelphia Electric Company?

A. Sure, he would.

Q. And not from you?

A. No.

Q. Now, then, the electricity which you generate is used for lighting the various portions of the building to be used in common by all the tenants, is that right?

A. Yes.

Q. And you use it in the boiler rooms for lights?

A. Yes.

Q. In the toilet rooms?

A. Yes.

Q. You use it to run your ash machine in the basement?

A. What machine?

Q. Ash machine.

A. Ice machine?

Q. Ash?

A. Oh, ash machine, the ash conveyor, yes.

Q. Yes, ash conveyor?

A. Yes.

Q. All right. What else do you use it for, for the purposes of the building?

A. Well, for lighting—that is about all.

Q. Do you have any—

A. You mentioned it all.

Q. Do you have any carpenter shop work that requires electric current?

A. Oh, yes, we have a circular saw, and we have an iron—emery stone, that is all D. C.

Q. And you use your own current for that?

A. Yes, our current.

Q. Because these are D. C. machines?

A. D. C. machines. We have a drill press, and so forth.

Q. Yes. Is there any one now in the basement?

A. No, the basement is empty.

Q. No tenant in the basement, basement is empty?

A. Yes.

MR. MASON: I have no further questions.

* * * (Tr. pp. 152, 153.)

BEN RASH, having been duly sworn according to law, was examined and testified as follows (Tr. pp. 153-172 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Rash?

A. 5915 Carpenter Street.

Q. And where are you employed?

A. Fishman & Tobin—that is in the Kirschbaum Building, fifth floor.

Q. In what capacity are you employed by Fishman & Tobin?

A. I am general manager.

Q. How long have you been employed by them?

A. Around three years.

Q. Are you familiar with their business and all of its phases?

A. Yes, in general.

Q. What is the business of Fishman & Tobin?

A. We manufacture boys' wash suits.

Q. Out of cotton cloth?

A. Cotton, yes,—wool, curduroy.

Q. Will you describe to the Court just how these wash suits are made by Fishman & Tobin in the Kirschbaum building?

A. Well, we get in the piece goods; they are cut in there, and they are sewed; they are pressed, and that is a finished garment.

Q. Then what happens to the finished garment?

A. That is shipped out to the stores.

Q. Do you know, Mr. Rash, where most of the raw material that you use in making these garments comes from?

A. Well, the majority of it comes from the South.

Q. Do you know what States?

A. We can get it from North Carolina, South Carolina—mostly from North Carolina and South Carolina.

Q. Do you know by what types of carrier the goods comes to Fishman & Tobin?

A. Well, we get it in by boat, by train. There is most any way it could come in—by train—boat—or—

Q. By motor?

A. Motor service.

Q. Motor truck? Motor freight?

A. Yes.

Q. Do you get any by railway express?

A. Very little—yes.

Q. Do you get any by parcel post?

A. Yes.

Q. Are incoming materials brought into the premises of Fishman & Tobin, or are they unloaded by the carrier on the unloading platform down at the street level?

A. They are brought in right onto our floor. Only we sign for them on the floor itself.

Q. Who brings them upstairs?

A. The carrier—whoever brings the goods.

Q. The truck driver or railway express employe, or whoever it may be?

A. Yes.

Q. And how frequently do you get incoming raw materials?

A. Every day.

Q. In what types of containers do those raw materials come?

A. Get them in cases; we get them in bales—maybe small packages sometimes, in just wrapping paper.

Q. When you get them in cases, how large are the cases generally?

A. Rather large—large size cases.

Q. Well, can you give us a more definite idea of the size of the case? Suppose you do it by reference to this table (indicating counsel table).

A. I would say half the size of the table.

Q. Do you have any idea of their weight?

A. Not offhand, no.

Q. Do you know, Mr. Rash, just approximately what percentage of the raw materials that come in to Fishman & Tobin come from points outside the State of Pennsylvania?

A. I should say around ninety per cent.

Q. Fishman & Tobin, you said, were on the fifth floor?

A. That is right.

Q. Do you know whether, Mr. Rash, it would be possible to carry any of these large wooden packing cases upstairs?

A. Carry them?

Q. Carry them up the staircases?

A. No.

By The Court:

Q. You say you don't know, or it would not?

A. I do not think it would be possible to carry those cases up five floors.

The Court: All right; I didn't know what your "no" meant.

By Mr. Brodie:

Q. Is there any regularity in the time at which incoming shipments come to you?

A. No, there is no set time.

Q. They come in at all times during the day?

A. At all times during the day.

Q. After the garments are made up and packed, your firm ships them out?

A. That is right.

Q. Have you any idea of the percentage of commodities that go to points outside the State of Pennsylvania?

A. I should say around eighty—eighty per cent.

Q. Does Fishman & Tobin do a mail order business?

A. Yes.

Q. Do they ship by any other means than parcel post?

A. Do we ship by any other means?

Q. Yes.

A. Oh, yes.

Q. Do you ship by railway express?

A. Yes.

Q. Do you ship by motor freight?

A. Yes.

Q. Do you ship by railroad?

A. Yes.

Q. In handling your outgoing shipments, do you deliver to the carrier at the carrier's place, or does the carrier pick up at your premises?

A. The carrier picks up at our premises.

Q. Is there any regularity with which the carrier comes and picks up?

A. Yes.

Q. How frequently and at what times do they come?

A. It is three o'clock and quarter after five.

Q. Daily?

A. Daily.

Q. Where do they come—to the fifth floor or to the loading platform downstairs?

A. Fifth floor.

Q. Are the packages addressed, sealed, packed and so forth, on the fifth floor before they are handed to the carrier?

A. Yes.

Q. And then what does the carrier do with them—take them down in the elevator and put them on his truck?

A. That is right.

Q. Does a week ever pass, Mr. Rash, during which Fishman & Tobin do not make shipments to points outside the State of Pennsylvania?

A. No.

Q. During the last two years, since October, 1938, has a week ever passed in which it has not happened?

A. Never.

Q. With respect to incoming shipments, has a week ever passed in which you did not receive any incoming shipments from outside the State of Pennsylvania—in the last two years?

A. No.

Q. Can you give us an approximation of the frequency with which you make shipments outside of the State of Pennsylvania? Is it daily, or once a week, or more times a week?

A. It is daily. We make shipments daily outside of the State.

Q. In describing the process by which you say these boys' wash suits were made, you said something about pressing, I believe; is that so?

A. Yes.

Q. In pressing, what type machinery do you use?

A. Hand iron.

Q. How are those hand irons heated?

A. With steam.

Q. Do you know where the steam comes from?

A. Building.

By The Court:

Q. You use the steam inside the iron?

A. Yes.

Q. By a tubing of some kind?

A. That is right.

By Mr. Brodie:

Q. How many irons that are operated by steam furnished by the building are used by Fishman & Tobin in manufacturing boys' suits?

A. Around forty-two—forty-three—something like that.

Q. Is steam used for any other purpose in the manufacture of these suits?

A. No.

Q. Do you know, Mr. Rash, whether it would be possible for Fishman & Tobin to manufacture and press these suits without steam?

A. No, I do not think so.

MR. MASON: I cannot hear that. What?

THE WITNESS: I do not think we could without the steam. We need the steam to press the garments.

MR. MASON: You say—

THE WITNESS: We need the steam to press the garments.

MR. MASON: That is not what he asked you. Could you do it without steam?

THE COURT: He says, "I do not think we could without steam." That is his answer.

By MR. BRODIE:

Q. Just at what point in the productive process of making the suits is steam used? Is it the first, the middle, or the last point?

A. It is the last.

Q. Does your firm use the elevators that the building has?

A. Elevators?

Q. Yes.

A. Yes.

Q. For passengers, or freight, or both?

A. Both.

Q. Do you use all three elevators?

A. Yes.

Q. Do you ever have customers come up to visit you on the elevators?

A. Sometimes.

Q. I assume the employes and also the members of the firm use the elevators to go to and from work, and at the lunch hour?

A. That is right.

Q. If the elevators stopped running, Mr. Rash, could Fishman & Tobin get any raw materials to manufacture, or ship out any finished products?

A. They could ship out finished products. If we could not—if we did not have the elevators, we probably could make our packages small enough to carry them down, but as far as coming up, I think I said before we could not manufacture—we need the elevators to bring the merchandise up.

MR. MASON: I am sorry, but I do not know whether it is the way you are sitting, but I just cannot hear your answers. Will you read that answer?

THE COURT: He says they could make the packages small enough to take them out without using the elevator, but as far as incoming packages, he does not believe they could get them up.

MR. MASON: That depends, of course, on how they were shipped.

THE COURT: Yes.

By MR. BRODIE:

Q. Does the building also supply a watchman, do you know?

A. Yes.

* * * (Tr. pp. 162, 163.)

Q. Do you know whether, Mr. Rash, your firm would remain in the Kirschbaum Building as a tenant if the watchman was not supplied?

A. Yes, sir.

Q. It would?
A. Yes, sir.

Mr. Mason: Ask another, Mr. Brodie.

The Court: That is what you get. It is an old story, isn't it?

By Mr. Brodie:

Q. Mr. Rash, let us revert a moment to the shipment of the outgoing merchandise, which you say could be carried downstairs if shipped in a slightly different form. Would not mean, instead of one large case to a customer, you might have to split it up into fifteen, twenty, or more packages?

A. That is right.

Q. Would that be a more expensive process?

A. Yes.

Q. To what extent would that inconvenience your operations?

A. I could not say exactly, but it would give us a little hardship—it would be a little more trouble.

Q. The building also supplies heat to the premises occupied by Fishman & Tobin, does it not?

A. That is right.

Q. Do you know whether it would be possible to operate in those premises during the cold winter months without heat?

A. No, you could not operate without heat.

* * * (Tr. pp. 164-167, inc.)

Cross-examination.

By Mr. Mason:

Q. Mr. Rash, in answer to some of Mr. Brodie's questions, you were telling about the use of heating irons for pressing.

A. Yes, sir.

Q. Now, you do a great deal of pressing with what you call gas irons, do you not—heating irons?

A. Heating irons.

Q. What?

A. Yes.

Q. And that gas is obtained from the Philadelphia Gas Works Company? You buy it from what you call the "U. G. I.", I suppose?

A. I don't think so.

Q. What? Well, where would you get it? You do not make it?

MR. MOETSCH: Could I answer that?

MR. MASON: No, you cannot answer that.

By MR. MASON:

Q. Where do you get the gas you use in the irons you use to press with?

A. I would rather not answer that. I may be under the wrong impression. I thought we were getting the steam through the building.

By THE COURT:

Q. We are not talking about steam—gas.

A. Oh, the gas. Gas, we get through the U. G. I.

By MR. MASON:

Q. That is right, and you use those irons to press with, don't you?

THE COURT: Do you not own irons that are heated by gas?

THE WITNESS: Yes.

THE COURT: And you use those irons for what?

THE WITNESS: For pressing of the garments.

By Mr. Mason:

Q. Pressing of the garments; and you use steam to press some with?

A. That is right. We need steam in there, too, yes.

Q. Yes. And did you ever in the old days, before there was a steam iron, know that you used a heated iron and a hot rag—a wet rag—in order to press with?

A. No; that was probably before my time.

Q. What?

A. Probably before my time.

Q. I think it was. You spoke also of heat as an absolute essential to your manufacturing establishment. What heat were you talking about—the heat that heated your building?

A. Heated the building, yes.

Q. For the comfort of the employes?

A. That is right.

Q. Were you around in 1918 when there was no heat in many of the buildings in Philadelphia?

Mr. Brodie: I object to that.

Mr. Mason: I want to show you that it is not necessary.

The Court: That is proper cross-examination, since he made that statement.

By Mr. Mason:

Q. Were you around here in 1918—the time when there was no heat allowed in any of these office buildings and loft buildings during certain days of the week?

A. I was too small at the time to remember.

Q. You were too small at the time to remember.

The Court: I don't believe they would stay long if they didn't have the heat there.

Mr. Mason: Fortunately that war did not stay very long to make it necessary.

THE COURT: No, but I mean now.

By MR. MASON:

Q. May I ask you what raw materials you were talking about in answer to Mr. Brodie's question, that came from states other than Pennsylvania?

A. We get rayon, cotton, wool.

Q. Cotton and wool?

A. Yes.

Q. Do you get the cotton raw, or do you get it made up in cotton goods?

A. Goods.

Q. Cotton goods?

A. That is right.

Q. Do you know where the manufacturer who makes the cotton goods gets his cotton?

A. Where he get the cotton?

Q. Yes.

A. No, I could not say.

Q. You do not know?

A. No.

Q. You do know what cotton is, don't you?

A. Yes.

Q. You do know that cotton which is grown in some parts of the South is essential to the cotton goods you have been using?

A. That is right.

Q. That does not grow to any very great extent in Pennsylvania, does it?

A. No.

Q. Now, coming to your wool—do you get the raw material in the form of raw wool and process it yourself, or do you get it in the form of—

A. Piece goods.

Q. Woolen goods?

A. Goods.

Q. And is that American wool?

A. Yes. I think it is; yes.

Q. That grows on sheep? What?

A. Yes.

Q. And do you know where the sheep are raised that the wool comes from that goes into the woolen goods that you get to make these suits out of?

A. No, I don't.

Q. You do not?

A. I do not know.

Q. That is, the material itself comes from outside of the State of Pennsylvania, but the wool might be grown in Pennsylvania?

A. Possibly.

Q. Did you tell us something about the use of lights in your building—in your part of the building? You have lights there?

A. Oh, yes.

Q. And where do you get your light from—the Philadelphia Electric Company?

A. Philadelphia Electric Company.

Q. And that is for the purpose of lighting as well as operating the machines?

A. That is right.

Q. Do you operate any of your machines by steam?

A. Other than the—no.

Q. None at all—that is all, thank you.

Re-direct-examination.

By Mr. Brodie:

Q. Just one question, Mr. Rash. These irons which are heated by gas also use steam, do they not?

A. Yes, that is it.

Q. Steam and gas are used in the same iron; isn't that so?

A. Yes; that is it.

LOUIS CASCIATO, having been duly sworn according to law, was examined and testified as follows (Tr. pp. 172-186 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Casciato?

A. 5646 Warrington Avenue.

Q. In what business are you?

A. I am connected with D'Alonzo-Lancaster, Inc., tailors to the trade.

Q. Where is the plant of D'Alonzo-Lancaster, Inc.?

A. At Broad and Carpenter, on the sixth floor of the Kirschbaum Building.

Q. What is your connection with that company?

A. I am assistant secretary and treasurer.

Q. Are you completely familiar with all the business done by D'Alonzo-Lancaster?

A. Practically all.

Q. Are you familiar with the nature of their operations?

A. Yes, sir.

Q. You described their business as "tailors to the trade." Just what did you mean by that?

A. Well, to put it in another way, it is wholesale custom tailors. We cut one suit at a time, individually.

Q. Men's suits or ladies' suits?

A. We do mostly men's—we have started ladies' clothes about a year ago.

By THE COURT:

Q. They take your measure in the store and they send it in to you?

A. That is it, and we finish it according to measure.

By MR. BRODIE:

Q. And as your plant on the sixth floor of the Kirsch-

baum Building, just what operations take place in the making of these suits?

A. You mean from the minute the order gets into the house?

Q. Yes.

A. It is a long process: we open by opening the mail—

Q. You can skip that. You get the order?

MR. MASON: May I interrupt just a moment, because I want to get clear the relationship of this witness and his company to the Kirschbaum Company. Did you develop that—as to whether or not he has any direct relationship with the building?

MR. BRODIE: I intended to develop that.

MR. MASON: Suppose you do that before you get into this: it may shorten it quite a bit if you will.

THE COURT: Is he a tenant?

MR. BRODIE: He is a sub-tenant.

MR. MASON: He has no relationship to the landlord at all.

By MR. MASON:

Q. Who do you lease from?

A. Nicholas D'Alonzo, also president of the D'Alonzo-Lancaster, Inc. He is the one that has the lease with Kirschbaum.

Q. But who supplies—

A. And we pay him the proportionate rate of the lease.

By MR. BRODIE:

Q. Now, will you please answer the last question that I put to you before Mr. Mason—

MR. MASON: What was that?

By Mr. Brodie:

Q. The question was, will you describe what happens in the operations of your business?

Mr. Mason: I object to that, sir, because there is no relationship here between this witness's business and the landlord at all; and therefore no connection between the landlord and whatever this sub-tenant may be doing.

The Court: Well, I will hear it subject to the objection, I think.

The Witness: You want me to explain?

By The Court:

Q. What happens is that you get some cloth in there, don't you?

A. No, first thing we do, we prepare for the season. We buy woolens and make what is known as a "sample line" and we send it out to the tailors and dealers.

Q. Like Wanamaker's and Strawbridge's?

A. Yes, you may go to Wanamaker's and pick up a piece of goods and they measure you.

Q. Oh, I have done it.

A. I don't know whether I am speaking out of turn.

Q. I didn't know whether you made it up—

A. I hope the Court may advise me, because sometimes I may give away a name like this—attorneys may ask you, do you do business with so and so?

Q. I don't care about that.

A. That is the way it works.

Q. And you make up the sample line and send it around to the stores?

A. That is it.

Q. After taking a man's measure in the store, what happens?

A. The order comes in and we turn it in to Nicholas D'Alonzo, who manufactures it for us.

By Mr. Brodie:

Q. Mr. Casciato, before you get the goods, do you do any sponging or shrinking of them?

A. No, the sponging and shrinking is done by Schwarzwaelder's.

Q. Is that done before it comes in your plant?

A. No, the piece goods comes in our plant first; then Schwarzwaelder's man picks them up, examines them, takes them out, sponges them, and brings them back to us.

Q. When he picks up the goods are the bolts rather large and heavy?

A. Yes; they average seventy to eighty yards to a bolt.

Q. Do you know how much a bolt of cloth would weigh?

A. Well, your average piece of goods today runs from nine and a half ounces to the yard to fourteen ounces to the yard, so if the bolt is sixty yards, you got to multiply one by the other, so a good average may be about sixty-five pounds, or something like that.

Q. Does Schwarzwaelder's man use the elevator to come up to your premises to get the goods?

A. Yes, sir.

Q. And when he leaves your premises with the goods?

A. Yes, sir.

Q. And also when he returns with the goods?

A. Yes, sir.

Q. Now, then, the goods are back in your plant, having been sponged, shrunk, and examined?

A. Yes, sir.

Q. They are cut by you and then what happens?

A. First, when the goods come back in our plant, we give it a number and put it in stock; then if we get an order on that particular goods, we pull that out of the bin and cut a suit according to the order from our tailor.

By The Court:

Q. How many yards to a suit?

A. According to the size—we average three and a half yards to the regular size.

By Mr. Brodie:

Q. And who does the sewing?

A. Nicholas D'Alonzo.

Q. On what kind of basis does he do the sewing for you?

A. He does it on a contract basis. We pay so much.

By The Court:

Q. Is that at the Kirschbaum Building?

A. On the same floor.

By Mr. Brodie:

Q. After the suits are sewn does Nicholas D'Alonzo return them to you?

A. Finished.

Q. Sir?

A. The suits are finished when we get them from Nicholas D'Alonzo.

Q. What do you do with them then?

A. We, of course, examine them and ship them.

Q. Are you familiar with the customers to whom you ship?

A. Yes, sir.

Q. Of your total business annually, about what percentage of it is with customers outside of Pennsylvania?

A. I would say from seventy to eighty per cent.

Q. Now, these raw materials that you get in—woolens that you have described—do you know where they come from?

A. Yes.

Q. Where?

A. All sections of the country—mostly from the New England States.

Q. Have you any idea what percentage comes from states other than Pennsylvania?

A. I would say about seventy-five to eighty per cent.

Q. How frequently do you get in shipments of raw materials?

A. Daily—almost daily—not the big bolts, I mean. We might miss a few days on a big bolt; but almost daily something is coming in. It may be just one suit length coming in, you see, where the customer uses his own cloth.

Q. During the last two years has it ever happened that a week has passed during which you did not get a shipment of goods from a point outside Pennsylvania?

A. When you say "goods" do you mean like for just one suit?

Q. I mean any kind of shipment.

A. Oh, no; we get it almost daily.

Q. And during the last two years, has a week ever passed during which you did not make a shipment of finished clothes outside the State of Pennsylvania?

A. No; we ship every day.

Q. By what types of transportation facilities do you ship?

A. Mostly parcel post—I could say about—well ninety per cent parcel post, and railway express is the balance.

Q. In making these shipments, do you take the garments to the carrier or does the carrier send someone to your plant for them?

A. We take them for the parcel post shipments to the post office.

Q. Yes.

A. And railway express—well, I would say even that, fifty per cent they pick up and fifty per cent we may take over, but their items are so small—

Q. Does the railway express stop regularly at your plant to see—

A. It calls every day to see if we have anything going out.

Q. Every day?

A. Every day.

Q. The incoming goods—are they unloaded at the platform downstairs or are they brought by the carrier right up to the sixth floor of your plant?

A. The carrier brings them up to the sixth floor.

Q. Do the goods come up on the elevator?

A. Yes, sir.

Q. If the elevator were not running could they be conveniently gotten upstairs?

A. Well, I don't think it would be humanly possible—if we got four or five pieces of goods—on somebody's shoulder up a stairway—something like that.

Q. How about outgoing shipments? Do you ever make them in large quantities, or only one suit at a time?

A. No, there may be twenty suits going out to one dealer, but as a rule we use mostly cartons. We may have a case shipment when we send out our display ends.

Q. How many cartons do you ship out at a time during your busy season?

A. What we consider a load. In other words, I might have twenty-five packages and say there is enough there to send the boy out to the post office.

Q. How many suits do you ship a week, approximately?

A. I would say about seven hundred—eight hundred.

Q. If the elevators were not running, would your business be seriously impeded?

A. If the elevators were not running?

Q. Yes; would it be difficult for you to make these outgoing shipments?

A. Why, yes; we would have to walk down six flights of steps.

Q. Would a man walking down six flights of steps be able conveniently to carry twenty-five cartons of suits?

A. No.
Q. Do you get lights from the Kirschbaum Building?
A. Yes.
Q. Between what hours?
A. I think seven-thirty to about five o'clock.

Mr. Mason: That is not material, Mr. Brodie. The Kirschbaum Building does not mean much in this particular instance. The sub-tenant relationship is with the tenant and not with Kirschbaum.

Mr. Brodie: The lights supplied by the building are necessary to the productive process.

Mr. Mason: They may not come from the Kirschbaum Building; they may come from the Philadelphia Electric Company.

The Court: We will see.

(Question repeated by the stenographer as follows: "Q. Between what hours? A. I think seven-thirty to about five o'clock.")

By Mr. Brodie:

Q. About five, what happens?
A. Then we get outside current.
Q. You have a switch which switches from house current supplied by the building, to outside current?
A. That is what I understand.
Q. What company supplies the outside current?
A. The Philadelphia Electric.
Q. Apart from the carriage of freight, what other use do you and your company make of the elevators in the building?
A. Well, all our employes go up and down in them.
Q. How about the customers?
A. Yes, we got customers coming up.
Q. Salesmen?
A. Salesmen.

Q. Do you find that during the rush hours there is often a jam on the elevators?

MR. MASON: What do you mean by "jam", Mr. Brodie?

By MR. BRODIE:

Q. A crush—do you find the elevators full? Do you sometimes have to wait?

A. I don't know—the only time I experience when they are busy—if all the building is letting out at noontime, the elevator comes to the fifth floor—instead of stopping at the sixth, they get their load and go down.

Q. What happens at those times? Do you walk downstairs or do you wait?

A. Oh, I wait.

MR. MASON: A typical American habit—you do not mind that interjection.

MR. BRODIE: Well, I don't think it adds anything to the case. I am not sure whether it is up to me to mind or not. If the Court does not object—

THE COURT: The Court does not object.

By MR. BRODIE:

Q. The premises that are occupied by you are also heated by the building, are they not?

A. Yes, sir.

Q. Could your company operate effectively without heat in the winter?

A. No, I do not think so.

MR. BRODIE: That, also, is, I assume, a typical American habit.

MR. MASON: Very typical.

By Mr. Brodie:

Q. Does the building supply watchmen?

A. Yes, sir.

Q. If the building did not supply watchmen would your firm engage a separate watchman?

A. Yes, sir.

Q. Why?

A. I think it is common sense. We got a lot of merchandise in there—you have no watchman, you have to have some protection system.

Mr. Brodie: You may cross-examine.

Cross-examination.

By Mr. Mason:

Q. Mr. Casciato, I ask you whether or not you engage in retail as well as wholesale business.

A. Yes, sir.

Q. Will you tell us to what extent?

By The Court:

Q. What do you mean by "retail"? What is your definition?

A. In the retail, Your Honor, it is mostly done on friendship. In other words, all my friends know I am in the tailoring business—they come up and say, "Louis, will you make me a suit?" And we sell at retail; but we don't advertise it. When I say "don't advertise," we don't put out no signs "factory to you."

Q. What is your wholesale business? Who are your customers there?

A. Tailors—we will say Wanamaker's—we mentioned Wanamaker's—custom tailors.

Q. Large stores?

A. Yes, or haberdasheries—it does not necessarily have to be a large tailoring establishment.

Q. Anybody that advertises they make suits to measure?

A. That is it.

Q. They send it in to you?

A. That is it.

MR. MASON: I have no further questions. Is there anything else?

MR. BRODIE: I have one further question to clear up this matter of retail business.

By MR. BRODIE:

Q. What percentage of your total business does this retail business amount to?

A. Oh, it is very, very small: I do not think it amounts to five per cent—not even that. It is very, very small.

MR. BRODIE: This witness also has records relating to shipments: there is no controversy over that?

THE COURT: If there should be, I will permit you to have him brought back.

MR. BRODIE: Then, sir,—

MR. MASON: I will say now there is not. I would like to move to strike out this witness's testimony.

THE COURT: You may make your motion: I will hold it.

MR. MASON: Your Honor will reserve ruling on it?

THE COURT: Yes.

MR. MASON: The motion is to strike out testimony on the ground that as an occupant of the building, he has no direct relationship to the owner as landlord, and the services concerned, and also, may I suggest—as counsel for the government appreciates—

that there is an exception in the Act with respect to those engaged in retail businesses.

THE COURT: All right; shall we adjourn until ten o'clock on Monday? Do you think it will take more than Monday?

MR. BRODIE: I think we should finish during Monday—perhaps late in the afternoon.

MR. MASON: We will go on this coming Monday at ten o'clock.

THE COURT: Yes.

(Adjourned until Monday, November 18, 1940, at 10.00 o'clock A. M.)

ADMISSIONS BY DEFENDANT FOR PURPOSES OF THIS CASE (Tr. pp. 199, 200.)

Denying that it or any of its employees are subject to or covered by the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201 *et seq.*), hereinafter called the "Act", A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation, defendant above named, by its undersigned attorneys, for the purposes of this case only, hereby stipulates and agrees:

That with respect to the following named persons who are or have previously been in the employ of the Defendant, the Defendant, from time to time, during the period stated in the Complaint filed in this case did not comply with the provisions of Section 7;

WILLIAM MENTZEL
McKINLEY EDWARDS
PETER ROCK
COLEMAN RUCKER

and with respect to the following named persons,

GEORGE E. SIMON
HARRY J. GALLAGHER
GEORGE EPPS
SAMUEL H. FLEMING
NICHOLAS CATTELISE
CLARENCE BERKELEY

the Defendant, from time to time, during the period stated in the Complaint filed in this case did not comply with the provisions of Section 6 and 7 of the said Act.

* * * (Tr. p. 200.)

ADOLPH W. HABER, having been duly sworn, was examined and testified as follows (Tr. pp. 200-216 inc.):

Direct-examination.

By MR. VOTAW:

Q. Mr. Haber, by whom are you employed?

A. Joseph B. Haber, Incorporated.

Q. And where is their place of business?

A. In the Kirschbaum Building, at 1335 Washington Avenue.

Q. What is your connection with Joseph B. Haber, Inc.?

A. I am secretary of the organization.

Q. Are you familiar with the business of that corporation?

A. I am.

Q. What is the business of that corporation?

A. Manufacturing knitted outerwear, sweaters and bathing suits.

Q. Does it operate continuously throughout the year?

A. It does.

Q. And what is the nature of your production operations?

A. We take in the raw material in the shape of yarns, knit them, cut them, operate them, and ship them in the form of bathing suits and sweaters.

Q. That is all done on your premises?

A. That is correct.

Q. Do you have to shrink the yarns after you cut them, or process them in any way?

A. Just steaming them to bring the cloth to the desired width for cutting and pressing the finished garments.

Q. What do you use, what kind of a machine do you use for that operation?

A. We use a decatising machine, which employs or uses live steam.

Q. Where do you get the live steam?

A. From the Kirschbaum Building.

Q. And what machine do you use for pressing?

A. A regular Hoffman press, also uses live steam, also delivered by the Kirschbaum Building.

Q. Could you operate your business without those machines?

A. No, we could not.

Q. Where does this yarn come from?

A. Mostly from New England and the South, depending upon whether it is worsted or cotton; worsted from New England, cotton from the South.

Q. In what form does it come? How does it come?

A. In cases.

Q. What size cases?

A. Around three hundred pounds apiece, I would say.

Q. Which floor are you on?

A. Second floor.

Q. How does that yarn get to your floor?

A. By elevator.

Q. By what agencies does it come from the South or from New England?

A. By water, by train, by motor truck, various methods, depending upon the source.

By Mr. Mason:

Q. How do you know that?

Mr. Mason: May I interrupt,—just a moment, Mr. Haber—because you are asking this witness to indulge in considerable speculation. I don't want to restrict him too much, but I am just curious to know whether he knows what he is talking about.

A. Why, when we get our invoices they are always accompanied by bill of lading which shows method of shipment, and quite often we have to call up to find why a shipment is delayed, and on those occasions I have had occasion to call all three types of agencies.

By Mr. Votaw:

Q. There is no speculation involved in where this came from, then?

A. No, sir, none whatever.

By Mr. Mason:

Q. Do you do all of that yourself?

A. I beg your pardon?

Q. Do you do all of that yourself?

A. No, sir, I don't, we have girls employed in the office.

Q. All right, go ahead.

A. But it is all directly under my supervision.

MR. MASON: Go ahead, Mr. Votaw.

By MR. VOTAW:

Q. Is it delivered to you on the platform on the ground floor or at your place of business?

A. At the platform—oh, I am sorry, you will have to qualify that question. I can't answer it exactly.

Q. Well, do your employees bring it up from the ground floor?

A. No, sir.

Q. Or does the carrier bring it up to you?

A. The carrier brings it up and delivers it to us on our floor.

Q. I see.

A. We sign for it on our floor.

Q. You sign for it on your floor?

A. That is correct.

Q. Would it be possible to get these shipments to your floor without the elevator?

A. It is possible, but difficult.

Q. Possible, but difficult. Where do you ship the completed sweaters and bathing suits?

A. All over the country.

Q. Have you any idea what per cent of your shipments are made to points outside of the State of Pennsylvania?

A. I should say about eighty to eighty-five per cent.

Q. Are those shipments under your supervision?

A. Well, yes,

Q. They are, and you are personally familiar with the places to which the shipments are made?

A. That is correct.

Q. You have your records with you showing shipments and also receipts, have you not?

A. I brought with me, bills, paid bills, showing payment for yarns received from New England and the South, both, and I brought with me bills of lading show-

ing shipments made to Chicago and Wisconsin, and places of that sort. I didn't bring but representative groups of that particular type.

MR. VOTAW: We understand, Your Honor, similarly to the ruling made last week, that it is not necessary to put those in evidence.

THE COURT: You have the right to put them in in case the evidence of the witness given on the stand is controverted in any way.

MR. VOTAW: All right.

By MR. VOTAW:

Q. What means of transportation do you use for the outgoing shipments?

A. The same three means that we use to receive goods.

Q. Railroad, motor express and steamship?

A. Steamship.

Q. Does any week pass during which a shipment to some point outside of the State of Pennsylvania is not made?

A. I doubt that very strongly.

Q. Are your shipments regular throughout the year or they in seasons?

A. No, we have peak seasons. We have one season, so-called fall season, which runs during the summer months, and the spring season, which starts around November, December, January and February.

Q. In case of your outgoing shipments at what point does the carrier pick up those shipments?

A. On our floor.

Q. On your floor?

A. Yes.

Q. Now, as to incoming shipments, does any week pass during which you do not receive shipments from outside the State of Pennsylvania?

A. There may be a week or possibly two weeks during the course of the year in which we receive nothing at all in the way of large shipments, but there isn't a week that goes by that we don't receive something, either through parcel post, or a small shipment delivered by a local carrier.

Q. Where would those small shipments delivered by local carriers come from?

A. Well, they might be—they might originate in Philadelphia, or they might originate in New York.

Q. Do you know what percentage of your incoming materials comes from points outside Pennsylvania?

A. I am sorry, I didn't hear the question.

Q. Do you know what percentage of incoming material comes from points outside of the State of Pennsylvania?

A. I would say about seventy per cent, about seventy per cent. That question—that question really could only be answered on the basis of value; do you mean by dollar value or by volume, or number of shipments?

Q. Well, you say it could only be answered—

A. It is quite an unfair—

Q. —on a dollar basis?

A. You want it on a dollar value basis?

Q. Well, could you give it both on a dollar value basis and on a quantity of shipment basis?

A. Well, on a dollar value basis I should say about eighty-five to ninety per cent of our goods comes from out of the State, and on a volume basis, number of actual shipments, it is closer to the first figure, of about seventy per cent. We get a lot of supplies, like buttons, and things like that, from Philadelphia, which means a lot of small shipments, but they aren't of much value.

Q. What is the usual weight of your outgoing shipments?

A. The case will weigh around two hundred and fifty to three hundred pounds.

Q. So that it would be inconvenient, to say the least, to ship them out without the elevator?

A. Yes.

MR. VOTAW: Will you mark this for identification?

(Lease of Joseph B. Haber, Inc., with the Kirschbaum Building was marked Exhibit P-4 for Identification.)

By MR. VOTAW:

Q. I show you document which has been marked P-4, and ask you if you can identify that.

A. This is our lease with the Kirschbaum Building, lease of Joseph B. Haber, Incorporated, with the Kirschbaum Building.

Q. This lease provides, inter alia, in paragraph 44, that the building will furnish a watchman, does it not?

(The witness examined the lease.)

A. It does.

MR. VOTAW: I offer this in evidence.

MR. MASON: I am not quite clear, Mr. Votaw, whether you are offering the lease itself, or various other exhibits attached to it. What are these papers?

MR. VOTAW: It is all together—

MR. MASON: Yes.

MR. VOTAW: —in the envelope. I am assuming it is together because it should be.

MR. MASON: Sometimes that assumption is not correct.

MR. VOTAW: That is correct.

MR. MASON: It seems to have some bearing.

THE COURT: It will be received, then, as a physical exhibit.

By MR. VOTAW:

Q. How long have you been in the building?

A. If I am not mistaken, it is from 1931 or '2.

Q. Have you been with them the whole time they were there?

A. Yes.

Q. Were you there at the time when Kirschbaum Company was still manufacturing clothing?

A. No.

Q. You were not?

A. Not with my knowledge, anyway.

Q. Now, do any of the incoming shipments come in otherwise than over the elevator?

A. Yes, parcel post is brought upstairs occasionally by the postman.

Q. And how about outgoing shipments?

A. Occasionally taken out by our employees, down the steps if the elevator has ceased to run.

Q. Would they be these two or three hundred pound packages that you spoke of?

A. No, they aren't quite that heavy, as a general rule.

Q. Those would be occasional shipments which you took down?

A. Very occasional.

Q. A very small percentage of your shipments?

A. That is right.

Q. How is your portion of the building heated?

A. We get heat from the Kirschbaum Building.

Q. Would you be able to operate in the winter months without heat?

A. No.

Cross-examination.

By Mr. Mason:

Q. Mr. Haber, you say you have been in the building for several years. I didn't catch the number when you answered.

A. I believe it has been about eight years.

Q. About eight years. Where were you operating before you came to the Kirschbaum Building?

A. At 1010 Race Street.

Q. And when you moved from there did you look over the field to see whether there were other places that you could go besides the Kirschbaum Building?

A. We did.

Q. And you found a number of them?

A. Found quite a few.

Q. As a matter of fact, there is a great deal of vacant space for your kind of work in Philadelphia, is there not?

A. Millions of feet.

Q. Millions of feet. Coming now to this question of incoming material, may I ask you if you are sufficiently familiar with the products of the company to tell us just what it is that you get from other people that enters into the finished product that you ship out?

A. I believe I can answer your question.

Q. All right. Well, would you mind enumerating the major items that you acquire from other people?

A. The chief items are yarns, worsted and cotton and core yarns. They come from—

Q. Do you use any silk?

A. Silk? No, sir, we don't use any silk. They come from Down East, New England—

Q. I beg your pardon?

A. They come from New England, in case of core yarns, and worsted, and in case of cotton, from Georgia or North Carolina, or South Carolina, depending upon the mill from whom we purchase them.

Q. Do you get any yarns from Philadelphia?

A. Oh, a few pounds now and then, only when we are unable to get deliveries in time from our regular sources, because local yarns have to be processed locally, and it is more expensive—

Q. Yes.

A. —to purchase it that way than if you place a contract with a large concern and have it manufactured for you, so it is only to fill a stock gap, in case we get short in a certain color.

Q. Now, your yarns are manufactured on order, or do you buy what you call staple yarns?

A. No, we contract for the yarns.

Q. But I mean, are they specially made for you or are they—

A. Oh, no, they are staple yarns.

Q. Staple yarns?

A. The same as almost everybody else in our field uses.

Q. Now, in addition to the wool and cotton yarns, what else do you get in the way of raw material?

A. We purchase buttons, boxes, zippers, sewing thread, cloth, leather.

Q. Can you tell us whether some of all of those items come from Pennsylvania?

A. Yes, the zippers do, in some part. Talon, I believe, is manufactured in Meadville, Pennsylvania, if I am not mistaken, and there are other concerns located outside of Pennsylvania from whom we also purchase zippers.

Q. And what percentage of your product are supplied with zippers?

A. Perhaps fifty per cent are supplied with zippers.

Q. And as I gather it from general information, you would have difficulty in selling those particular articles without zippers, isn't that so?

A. That is correct.

Q. And those zippers come from Meadville, Pennsylvania, where they are manufactured by Talon, Inc.?

A. In part, yes.

Q. Yes.

A. We also purchase zippers from two other sources, and we also use foreign zippers.

Q. Use what?

A. Foreign zippers.

Q. Foreign zippers. You don't use those nowadays, do you?

A. Yes, I am afraid we do.

Q. How is that?

By The Court:

Q. Where do you get them?

A. They come from New York importers.

Q. I know, but from what country?

A. They come from the Philippines, from China and from Japan.

By Mr. Mason:

Q. Particularly from Japan?

A. Particularly from Japan, yes, sir.

Q. Yes. Then with reference to buttons, do you contract for your buttons for delivery from points outside Pennsylvania, or some from inside Pennsylvania?

A. Well, it is handled in two ways. The representative of the mill carries a small stock in Pennsylvania, in Philadelphia. Occasionally he can supply us out of his stock. When we order large quantities they come from the mill direct, and that is located in Massachusetts.

Q. And where you use buttons, the buttons are a necessary part of the product?

A. That is correct.

Q. Now, how are those sweaters and bathing suits made? Are any of them handmade, or are they all machine made?

A. All machine made.

Q. And is that machine, the running of the machine, a necessary part of the production?

A. Definitely, yes.

Q. Do the machines ever need repair or are they perfect?

A. They quite often need repair.

Q. I understand that you have one or more of your own employees that are assigned to that repair work?

A. That is correct.

Q. And you also require the services of outside machinists to do some of the repair work?

A. That is correct, also.

Q. Now, are the machinists that you bring in from outside, are they located in Philadelphia or do they come across the State line, from Baltimore or Camden?

A. Well, with only one exception that I can think of in the last three or four years, they are all from Philadelphia.

Q. All from Philadelphia. Do you use current for those machines?

A. We do.

Q. Electric current?

A. Yes.

Q. Where is that obtained?

A. From the Philadelphia Electric.

Q. Philadelphia Electric.

MR. MASON: That is all, thank you.

Re-direct-examination.

By MR. VOTAW:

Q. Do you carry a large inventory?

A. It isn't very large, no; I mean, based upon our capitalization it is fairly large.

MR. VOTAW: That is all.

NICHOLAS D'ALONZO, having been duly sworn, was examined and testified as follows (Tr. pp. 217-240 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. D'Alonzo, please?
A. I live 304 Essex Avenue, Narberth, Pennsylvania.
Q. What is your business Mr. D'Alonzo?
A. Contractor, men's clothing.
Q. Contract manufacturer of men's clothing?
A. Yes, sir.
Q. Where is your shop?
A. Broad and Carpenter.
Q. In the Kirschbaum Building?
A. Yes, sir.
Q. How long have you been in that building?
A. About ten years.
Q. Will you describe to the Court what you mean by contract manufacturer of men's clothing?
A. Well, I get the work from outside and manufacture.
Q. Do you mean, Mr. D'Alonzo, that you get suits or coats all cut, and then you sew them and finish them in your plant and ship them back to the person who has shipped the cut goods to you?
A. Yes, sir.
Q. And in manufacturing those suits and coats will you describe to the Court just what you do?
A. Well, when we receive it is cut, put together, finished, and send them out.
Q. Well, do your employees sew?
A. Yes, sir.
Q. Do your employees press?
A. Sure.
Q. Do they examine?
A. Yes.

Q. Do they sew on buttons?

A. Everything.

Q. In other words, they make the finished garment from the pieces of cloth that are sent to you all cut?

A. Yes, sir.

Q. Approximately how many suits do you make weekly in your shop?

A. An average of five hundred.

Q. For whom do you do contract work?

A. In the City?

Q. Well, anywhere.

A. Well, D'Alonzo-Lancaster, and Ullman Brothers, in New York.

Q. D'Alonzo-Lancaster is located on the same floor—

A. Yes.

Q. —as your company?

A. Yes, sir.

Q. It is a sub-tenant of yours, is it?

A. Yes, sir.

Q. What connection have you with D'Alonzo-Lancaster?

A. I am a stockholder.

Q. Are you also an officer?

A. Yes, sir.

Q. What office?

A. President.

Q. Ullman Brothers is located where?

A. 79 Fifth Avenue, New York.

Q. How long have you been doing business for both of those companies?

A. About ten, fifteen years.

Q. How frequently do you get shipments of cut goods from Ullman Brothers?

A. Every day.

Q. How frequently do you ship back to Ullman Brothers in New York?

A. Well, pretty nearly every day, except a few slow months in the year.

Q. And during those slow months about how frequently do you ship?

A. Well, we have been shipping nothing.

Q. How about your business for D'Alonzo-Lancaster, does that proceed throughout the year?

A. Yes, sir.

Q. And you manufacture for that company every week in the year?

A. Every week in the year.

Q. Just what transportation facilities are used in bringing the cut goods to your plant from Ullman Brothers, of New York, and shipping the finished suits and coats from your plant to Ullman Brothers, in New York?

A. Will you say that again?

By The Court:

Q. How are they transported from Ullman to your plant?

A. By truck.

By Mr. Brodie:

Q. Is that your own truck?

A. No, sir.

Q. Or is it a carrier?

A. No, theirs.

Q. A contract carrier—

A. Carrier.

Q. —or common carrier?

A. Contractor.

Q. Do you know the name of the company?

A. The Tri-State.

Q. And when that company makes deliveries to you from New York does it bring the cut goods up to your shop or does it unload them down—

A. No.

Q. —on the street floor?

A. Right on the floor.

Q. Right on your floor?

A. Yes, sir.

Q. And you receive them there?

A. Yes.

Q. On what floor is your shop?

A. On the sixth floor.

Q. And how do they bring those goods up to you? Do they walk upstairs, or do they use the elevator?

A. Freight elevator.

Q. Are the number of suits which come in in shipments from D'Alonzo-Lancaster—is the number large, generally, or is it a small quantity—

A. Small bundle.

Q. —of suits? How many suits at a time?

A. One.

Q. One suit?

A. At a time.

Q. Well, I asked—

THE COURT: Yes, you said D'Alonzo.

By MR. BRODIE:

Q. I became a trifle confused, yes, I meant Ullman Brothers.

A. Ullman?

Q. Yes.

A. Well, depends, about three hundred or four hundred.

Q. Three hundred or four hundred suits at a time?

A. Yes.

Q. Would it be possible to carry three hundred or four hundred suits at a time up to the sixth floor from the street level?

MR. MASON: Well, now, wait a minute, Mr. Brodie, you don't really mean—they couldn't be carried up one at a time, I presume.

MR. BRODIE: I didn't ask him that, I asked if six hundred could be carried up.

MR. MASON: Well, but how? What do you mean, altogether, or one at a time, or how?

By MR. BRODIE:

Q. Could six hundred—

THE COURT: Well, I guess I understand it.

MR. BRODIE: Sir?

THE COURT: I believe I understand the situation. It doesn't make much difference how he answers the question, it is quite all right. I will answer it, "No." I will answer the question "No", as far as all practical purposes are concerned.

MR. BRODIE: All right, sir. I take it that Your Honor does not subject himself to cross-examination by that answer.

THE COURT: Oh, I am willing to.

By MR. BRODIE:

Q. Now, how many suits do you ship out at a time generally to Ullman Brothers?

A. Oh, around two hundred or one hundred and fifty a day.

Q. How are those suits shipped out? Are they packed in cases or do they go out on racks?

A. On a rack.

Q. Will you describe a rack to the Court?

A. How many in a rack?

Q. No,—

By THE COURT:

Q. What does it look like?

By Mr. Brodie:

Q. Just tell us what a rack looks like.
A. About six foot high, and a hanger—and hangers.

By The Court:

Q. Like that hat rack (indicating)?
A. A thing like that, yes.
Q. With a bar on there, and a lot of hangers?
A. Lot of hangers, yes, sir.

By Mr. Brodie:

Q. Could that be carried down six flights of stairs, Mr. D'Alonzo?
A. Well, why not?
Q. Sir?
A. Sure, you can carry it down, why not?

The Court: The answer is, "Not very well". Go ahead.

By Mr. Brodie:

Q. Now, in the manufacture of suits do you use steam?
A. Yes, sir.
Q. Sir?
A. Yes, sir.
Q. For what purpose?
A. Pressing and under pressing.
Q. How many pressing machines do you have?
A. About forty.
Q. Do you use high pressure or low pressure steam?
A. High pressure.
Q. Would low pressure steam be satisfactory?
A. No.
Q. Why not?
A. Well, it don't give you the results.

Q. Do you know at what pressure the steam must be supplied to you?

A. Around about sixty-five.

Q. Sixty-five pounds?

A. Pounds, yes.

Q. Where do you get your steam?

A. From the Kirschbaum Building.

Q. Could you operate if you didn't have steam?

A. No.

Q. If the building didn't furnish steam could you operate there?

A. I would say no.

Q. Why do you say that?

A. Because I couldn't—I couldn't produce the quality of the work without steam.

Q. Is there any reason why you couldn't supply your own steam?

A. The reason? How can I use it, I got to use gas?

Q. You would have to have a boiler on your own floor?

A. Yes.

Q. Have you ever had any experience with such a situation?

A. Oh, yes, yes, sir.

Q. Where?

A. 1224 Cherry Street.

Q. And what happened there?

A. Well, I had my own boiler, and make my own steam, and then gas; didn't have no results.

Q. Did the fact that the Kirschbaum Building supplied steam to you have anything to do with your renting the premises that you now occupy?

A. The rent didn't mean nothing; the rent?

By The Court:

Q. Did you go there because they furnished steam? Was that one of the reasons why you went there?

A. Yes, sir.

By Mr. Brodie:

Q. Was the fact that the other building in which you manufactured did not operate, did not furnish steam, influence you in making up your mind to move out?

A. If they didn't give me the steam?

Q. The last building in which you—

A. Yes.

Q. —didn't have steam?

A. No.

Q. You had to supply your own?

A. Yes.

Q. Did that have anything to do with your decision to move out?

A. Oh, yes, yes.

Q. Just what?

A. Just because didn't have enough steam.

Q. Did you find the generation of your own steam in a gas boiler in your premises more or less expensive than having it supplied by the building?

A. It was more expensive.

Q. Did you find it more or less dangerous?

A. More dangerous.

Q. Do you know whether that had any effect upon your insurance rates?

A. Well, I don't think so.

Q. Well, let me put the question this way. Was your fire insurance rate higher in the building you formerly occupied than it is now?

A. It was higher.

Q. It was higher?

A. Yes, sir.

Mr. Mason: Of course, that might be because of the building; might it not?

The Court: Well, it might be for a dozen different reasons.

MR. BRODIE: Yes, sir.

By MR. BRODIE:

Q. Do you know whether the fact that you generated steam on your own floor had anything to do with the higher insurance rate?

A. Well, I—well, that isn't up to me, I don't know, that is insurance people.

THE COURT: He wouldn't know that.

MR. BRODIE: All right, sir.

By MR. BRODIE:

Q. These pressing machines that you have, are they rather large, heavy machines?

A. Yes, sir.

Q. Does the operation of those machines transmit shocks to the floor on which they stand?

A. Well, yes.

Q. Could you hire a loft in any old building and set up thirty or forty pressing machines?

A. No, sir.

Q. Why not?

A. Well, because the floor isn't strong enough to hold those machines.

Q. Do you operate the sewing machines that you use in sewing these garments by electric motors?

A. Yes, sir.

Q. How many sewing machines do you have?

A. Sixty.

Q. Do you use electric lights in your premises?

A. Yes, sir.

Q. Where do you get the electricity for those lights?

A. Well, we get it inside and outside.

Q. Well, what do you mean by inside?

A. In the building.

Q. Kirschbaum Building?

A. Yes, sir.

Q. Between what hours do you get it from the building?

A. Seven to five-thirty.

Q. Seven in the morning until five-thirty at night?

A. Yes, sir.

Q. Mr. D'Alonzo, if there were no elevators in the Kirschbaum Building, or if the elevators stopped running, could you operate your business there?

A. No.

Q. Why not?

A. Well, for the simple reason they pick the stuff up and the people got to walk to the sixth floor?

Q. You mean that your employees wouldn't walk to the sixth floor?

A. I wouldn't permit.

Q. How many employees do you have?

A. About three hundred.

Q. What is the average weekly payroll that you have?

A. Six or seven thousand dollars.

Q. Has there ever been any occasion, Mr. D'Alonzo, when the power of the elevators failed and the elevators didn't run?

A. Well, that never happened; if it happens one elevator, they use another elevator.

Q. And do you use all three elevators in the building?

A. Who, me?

Q. I mean the people who work for you and for incoming and outgoing shipments, your company.

A. Yes.

Q. Sir?

A. They use both elevators.

Q. Both elevators?

A. Yes.

Q. Well, there are three in the building,—

A. Well,—

Q. —two together, a freight and a passenger,—

A. Yes.

Q. —in one portion of the building, and then there is another.

A. We use the front elevator.

Q. Sir?

A. We use the front elevator.

Q. The front elevator?

A. Yes, sir.

Q. Do you find, Mr. D'Alonzo, during rush hours that you are able to get sufficient elevator service, or do you find that sometimes the elevators cannot accommodate all the people who want to use them?

A. Oh, yes, we get pretty good service.

Q. Do you ever find that the elevators can't accommodate all the passengers,—

A. No.

Q. —at or about lunch hour?

A. No.

MR. MASON: I am curious to know the relevancy of this. May I ask it, Mr. Brodie?

MR. BRODIE: Sir?

MR. MASON: May I ask the relevancy of the question and answer that you got onto the record regarding the elevators, the sufficiency of the capacity of the elevators? Is this an inquiry to have an Act of Congress passed to have another elevator put in the building?

MR. BRODIE: No.

MR. MASON: What is the purpose of it?

THE COURT: I wonder myself.

MR. BRODIE: The purpose is to show the dependence of these people upon the elevator service supplied by the building, that is all.

THE COURT: All right.

MR. BRODIE: Sir?

THE COURT: I say, all right.

By MR. BRODIE:

Q. Is there a watchman in the building, Mr. D'Alonzo?
A. What is that?
Q. Is there a watchman in the building?
A. Yes, sir.
Q. Do you rely upon that watchman to any extent?
A. Oh, yes, yes, so far.
Q. If the building did not have a watchman would you hire one?
A. No.
Q. Where do you get heat?
A. Kirschbaum Building.
Q. Would you be able to operate in the cold weather months, Mr. D'Alonzo, if the building did not supply heat?
A. Well, not so easy.
Q. Mr. D'Alonzo, when you make your outgoing shipments to Ullman Brothers do your employees carry the goods downstairs and put them on the truck?
A. No.
Q. Or does the truckman come upstairs and take the goods in your factory?
A. Truckman takes care of that.
Q. Picks them up on the sixth floor?
A. Yes.

MR. BRODIE: I have no further questions.

Cross-examination.

By MR. MASON:

Q. Mr. D'Alonzo, with reference to your electric current, are all of your machines operated by electric current?

A. Yes, sir.

Q. And how many of them use direct and how many alternating current?

A. Well, I think it will be about a row of machines I use from inside the building, about ten machines; all the rest outside.

Q. How many are all the rest, about forty?

A. Forty, fifty.

Q. Forty or fifty, and those are all operated by current you get from the Philadelphia Electric Company?

A. Philadelphia Electric, yes, sir.

Q. And there are some of the lights in your place of business that are also operated by Philadelphia Electric Company—

A. Yes, sir.

Q. —current?

A. Yes, sir.

Q. Now, after you get into your place of business the pieces of the suit of clothes or garment, what additional materials do you have to have before you finish it?

A. Well, sewing, and pretty near that is all.

Q. You have what?

A. Sewing.

Q. Sewing?

A. Yes.

Q. Well, do you furnish the buttons?

A. No, they furnish the buttons.

Q. They furnish the buttons?

A. Yes, sir.

Q. Is that true of Ullman? Does Ullman furnish all buttons?

A. Ullman Brothers, yes, sir.

Q. Where did you get the zippers?

A. Well, we don't use no zippers.

Q. Don't use any zippers?

A. In case we use it, they send for them.

Q. You send for those?

A. They come with the bundle.

Q. Where do you get your thread from?

A. Philadelphia.

Q. From Philadelphia?

A. Yes.

Q. And can you make a suit of clothes without using thread?

A. No.

Q. Do you get your thread all from one place in Philadelphia?

A. Yes, sir.

Q. Your spoke of having moved from the building which you previously operated in to the Kirschbaum Building, and that in the other building you had to furnish your own steam. I understand that that is correct?

A. Yes.

Q. When you were coming to the Kirschbaum Building or contemplating moving did you examine into the available space in Philadelphia?

A. Yes, sir.

Q. Were there any buildings in Philadelphia other than the Kirschbaum Building that had a floor strength to stand the pressure that Mr. Brodie has directed our attention to in your business?

A. Well, I find that this floor one of the best for clothing, I think this floor, this building, was put up as for clothing.

Q. That is a grand advertisement, but were there other buildings that would accommodate your business? What?

A. Well, not so easy.

Q. Not so easy?

A. Not so easy, absolutely.

Q. All right. Were there other buildings that furnish steam?

A. Yes, sir, some.

Q. Some, and what is the general condition in Philadelphia today, if you know, regarding available space—

MR. BRODIE: I object—I am sorry, are you through?

MR. MASON: I wasn't, but you can interrupt now. You see what the question is going to be.

MR. BRODIE: I object on the ground that it is irrelevant.

THE COURT: Well, I don't see the relevancy.

MR. MASON: We have had it already from the other witness.

THE COURT: I will take it subject to the objection.

MR. MASON: I don't want to burden the record with anything else.

By MR. MASON:

Q. Do you use gas?
A. Yes, sir.
Q. What for?
A. Sixth, for the finished pressing.
Q. For pressing?
A. Yes, sir.
Q. That is, for gas iron?
A. Gas iron? No, gas and air, you know.
Q. How is that?
A. Gas and air, for hand pressing.
Q. Hand pressing?
A. Yes, sir.
Q. And is that a machine or an iron?
A. Iron.
Q. Iron?
A. Yes, sir.
Q. And where do you get that gas?
A. The gas? Philadelphia.
Q. From Philadelphia?

A. Yes, sir.

Q. The gas company in Philadelphia?

A. Yes.

Q. Do your machines ever need repair?

A. Oh, yes.

Q. What?

A. Yes, sir.

Q. Well, do you have it all done by your own employees, or do you have somebody outside to do it for you?

A. We got somebody outside, and I got my own man.

Q. You have both?

A. Yes.

Q. And is the mechanic who does the repair work on your machines a Philadelphian? I mean to say, does he work in Philadelphia?

A. Yes, sir.

Q. From Philadelphia?

A. Yes, sir.

Q. Is that one company that furnishes that service to you, or more than one?

A. More than one.

Q. In Philadelphia, more than one company?

A. More than one.

Q. Depending on the kind of repair work you have to have done, I suppose?

A. Yes.

Q. Pardon?

A. What say?

Q. Do you vary your outside service for repairs to the machines depending upon the kind of work that is done, or just because you change from one contractor to another?

A. Well, not all, we change, and the requirement to repair those machines.

Mr. Mason: I see, that is all.

Mr. Brodie: I have no further questions.

If Your Honor please, may I make the same remarks regarding the records of this particular witness, if there is any controversy respecting the shipments?

THE COURT: Yes.

MR. MASON: Well, that may be regarded as applying to all of the testimony regarding shipments by the tenants.

THE COURT: Yes.

MR. MASON: That includes incoming and outgoing shipments.

MR. BRODIE: Yes, sir. Mr. Sharlit.

SAMUEL SHARLIT, having been duly sworn, was examined and testified as follows (Tr. pp. 240-254 inc.):

Direct-examination.

MR. BRODIE: If Your Honor please, before commencing the examination of this witness I would like to introduce the lease between the Kirschbaum Building and Nicholas D'Alonzo. I offer these two separate papers, one dated October 31, 1936, and the other January 3, 1935, as one exhibit.

(Leases of Nicholas D'Alonzo with the Kirschbaum Building was marked Exhibit P-5.)

By MR. BRODIE:

Q. Where do you live, Mr. Sharlit?
A. 5620 Lebanon Avenue.
Q. And what business are you in?
A. Clothing men's work.
Q. Where is your shop?

A. Kirschbaum Building, Southwest Corner Broad and Carpenter Streets.

Q. What is the name of your company?

A. Isadore Spivak and Company.

Q. What is your connection with the company?

A. General manager.

Q. And what floor of the Kirschbaum Building does your company occupy?

A. Second floor front.

Q. How long have you been in that building?

A. Since 1937, April, 1937.

Q. Not quite four years?

A. That is right.

Q. I understood you to say that you manufacture men's work clothes?

A. That is right.

Q. Woolen or cotton?

A. All cotton.

Q. Will you describe to the Court just what manufacturing processes take place in your shop?

A. Well, we get in the cloth, cut them up, sew them up, press them, and we sell them to our trade.

Q. Where do you get the cloth from?

A. Mostly down South.

Q. How frequently do you get shipments of cotton cloth from the South?

A. Every day.

Q. Do you know by what types of carriers the cotton cloth comes to you from the South?

A. Yes, steamship, railroad, motor freight.

Q. Is delivery made to your shop on the second floor or are the goods unloaded at the platform at the rear of the building and then carried upstairs with your employees?

A. No, they are delivered to the platform, then on the elevator and truckman brings them up to our floor.

Q. Truckman brings them direct to your floor?

A. That is right.

Q. In what type, what types of containers—

A. Bales.

Q. —do those—sir?

A. Bales.

Q. Bales. Have you any idea how large, or how heavy those bales are?

A. They run anywheres from about three hundred and fifty to four hundred pounds a bale.

Q. In the operation of sewing these work garments do you use sewing machines operated on electric current?

A. Yes.

Q. How many sewing machines have you?

A. About forty-five to fifty.

Q. Do you know what kind of motors operate those machines?

A. You mean—

Q. Are they direct or alternating current motors?

A. They are alternating current, from the building.

Q. Sir?

A. From the building.

Q. The current is from the building?

A. That is right.

By The Court:

Q. Well, then, it is direct, isn't it?

By Mr. Brodie:

Q. The building furnishes direct current?

A. That is right.

Q. Can those motors operate on current supplied by the Philadelphia Electric Company?

A. No, not these motors.

Q. Do you, Mr. Spivak,—

A. Sharlit, I beg your pardon.

Q. I am terribly sorry, Sharlit—use any steam in your operations?

A. Yes, sir.
Q. For what purpose?
A. Pressing the garments.
Q. How many pressing machines do you have?
A. Five.
Q. And who supplies the steam to you?
A. The Kirschbaum Building.
Q. Could you operate without this steam?
A. No, sir.
Q. Why not?
A. Well, it would look like a bunch of rags after they are through.
Q. You mean—
A. They have to be pressed.

Mr. Mason: I didn't get that answer. Speak a little louder, please.

The Court: They would look like a bunch of rags after we get through, they have to be pressed.

The Witness: They have to be pressed.

By Mr. Brodie:

Q. And is the steam which the building supplies to you essential for the pressing of those garments?
A. Absolutely.
Q. Mr. Sharlit, when your company rented the premises in the Kirschbaum Building did you have anything to do with negotiating the lease?
A. I, personally?
Q. Yes.
A. Yes. It was a corporation at that time.
Q. And do you know whether your company was influenced in renting the premises in the Kirschbaum Building because it supplied steam and electric current?
A. More or less.
Q. Well, is your answer "yes" or "no"?
A. Yes, I would say yes.

Q. Would you, Mr. Sharlit, consider a loft in which your garments could not be pressed?

A. No.

Q. Does your company or the employees of it use the elevators?

A. No, only a few, maybe.

Q. That is, for passenger transportation?

A. Yes.

Q. But how about freight transportation?

A. Oh, freight, it is used every day.

Q. Where do you ship the finished garments which you manufacture?

A. Oh, several States, I would say about twenty States, twenty-five.

Q. How frequently do you make shipments?

A. Every day in the week.

Q. Do you make shipments every day to points outside the—

A. Yes, sir.

Q. —State of Pennsylvania?

A. Yes, sir.

Q. May I ask you, Mr. Sharlit, whether when you make these shipments your employees take the goods downstairs and hand them to the carrier, or whether the carrier picks them up at your shop?

A. The carrier picks them up at our shop.

Q. In what kind of containers do you generally ship?

A. Mostly in wooden cases.

Q. Approximately how large are those wooden cases?

A. Anywheres from two hundred and fifty to three hundred pounds.

Q. And—

A. Two hundred pounds.

Q. That is in weight; how much in cubic content?

A. Oh, well, it would be about, say, a yard and a half high and about two yards long, maybe smaller or bigger.

Q. Are those cases taken down on the elevator or are they carried downstairs by the truckmen?

A. Taken down on the elevator.

Q. Do you know, Mr. Sharlit, what percentage of the goods that you ship goes out of the State of Pennsylvania?

A. I would say about seventy-five per cent of it, seventy, seventy-five, around that figure.

Q. Do you mean by the number of shipments, seventy-five per cent of the number of shipments, or do you mean seventy-five per cent of the total volume of business that you do?

A. Seventy-five per cent of the total volume of business.

Q. Approximately what is the annual total of your business?

A. In the year?

Q. Yes.

A. I would say about three hundred thousand dollars.

Q. Approximately what percentage of the cotton goods and other materials you use in manufacturing these work clothes comes from points outside the State of Pennsylvania?

A. I would figure almost all.

Q. Does a week, or has a week ever passed within the last two years during which you did not receive a shipment of goods from outside Pennsylvania, and during which you did not make a shipment of goods to points outside Pennsylvania?

A. Well, maybe during the dull season, around December, maybe a day or so missed, otherwise we make shipments and receive goods every day in the year.

Q. Your shop is heated, is it not, Mr. Sharlit?

A. Yes.

Q. In the cold weather?

A. Yes, sir.

Q. Where does the heat come from?

A. From the Kirschbaum Building.

THE COURT: I will recess for ten minutes, gentlemen.

(Recess at 11.25 o'clock A. M.)

SAMUEL SHARLIT, resumed.

Direct-examination (Continued).

MR. BRODIE: Shall I proceed, Your Honor?

THE COURT: Go ahead.

By MR. BRODIE:

Q. The last question, I believe, was, "Where do you get your heat from?", and the answer was, Kirschbaum Building?

A. Yes, sir.

Q. Could your business operate effectively during the cold weather if the premises were not heated?

A. Well, I don't think so.

Q. Now, let's revert for a moment to the sewing machines which you have which are operated by direct current motors. At what time does your shop stop working?

A. Five o'clock.

Q. In the afternoon, and why is that?

A. Well, we don't get no more current, after five, around five minutes or ten minutes after five.

Q. You mean the building current shuts down?

A. On our floor.

Q. Yes, and you can't run your sewing machines?

A. No.

Q. How many employees do you have, Mr. Sharlit?

A. Around forty-five.

Q. And approximately what is your weekly pay-roll?

A. Around eight hundred dollars, eight hundred and fifty.

Mr. Brodie: I offer into evidence the lease between A. B. Kirschbaum and I. and C. Spivak, Incorporated. There is no objection to this lease?

Mr. Mason: No.

(Lease of I. and C. Spivak, Incorporated, with A. B. Kirschbaum was marked Exhibit P-6.)

Mr. Brodie: You may cross-examine.

Cross-examination.

By Mr. Mason:

Q. Mr. Sharlit, what is the difference between a direct current machine and an alternating current machine in your business?

A. A direct current machine would have—would have to have different motors to run the machines.

Q. Yes.

A. Than the alternating current.

Q. But it is only the motor, isn't it?

A. The motor is right.

Q. Yes, and did you ever think of changing over to alternating?

A. Well, there was a rumor going around the building that Philadelphia Electric is going to install the current.

Q. Yes.

A. And they would change our motors. Otherwise we would never think of it, because the motors—

Q. Well,—

A. —are very expensive.

Q. Well, the only reason you haven't got alternating current is because of the expense of putting it in, isn't that so.

A. The expense of the motors.

Q. Yes.

A. Right.

Q. Yes, it is the universal type of current that is being generally used, is that right, for your machines, the type of machines that you have?

A. You mean the general—

Q. Yes.

A. Philadelphia Electric?

Q. No. Do you know the difference between—well, let me put it this way: You know that a great many of the tenants in the building that do the same general kind of work that you do have machines that are run by a motor that uses alternating current?

A. Yes, sir.

Q. Well, why do they use that?

A. I suppose they want to work a little longer than we do.

Q. Yes, so that if you wanted to work longer than five o'clock you would put in the motors that would take the Philadelphia Electric current, which is the alternating current?

A. If we would, yes.

Q. Yes.

By The Court:

Q. But you don't do it because it is too expensive to make the change, is that right?

A. Yes, sir.

Q. Yes.

By Mr. Mason:

Q. Now, when you came to move from your former building to the Kirschbaum Building you told counsel that you were influenced by the fact that you could get steam, live steam, and you could get direct current. How many other buildings did you inquire about at that time?

A. Well, we inquired quite a few.

Q. Yes, and you found there were a number of them that could give you both steam and direct current?

A. Quite a few.

Q. Quite a few. With reference to those machines, are they new or old, the machines that you use.

A. The motors or the machines?

Q. No, the machines.

A. They are ours.

Q. Old, how old?

A. We bought them, we paid for them.

Q. I say, how old?

By The Court:

Q. How old?

A. How old? You mean the sewing machines?

By Mr. Mason:

Q. Yes.

A. Well, some of them may be ten years old, some of them may be five years old, and some may be fifteen.

Q. And how old are the motors?

A. Around that field, around five to ten years.

Q. You haven't gotten any new direct current motors in lately, have you?

A. No.

Q. Because you are contemplating changing some day to the alternating current motor, aren't you?

A. No, we are not at present.

Q. Not unless you have to?

A. Unless we are compelled to.

Q. Yes. Well, now, do you do the repairs to your machines yourself?

A. Yes.

Q. I don't mean you, personally,—

A. Yes, yes.

Q. —but somebody in your employ?

A. We have repairs to machinery every day.

Q. Well, now, are the repairs done by one of your employees, or by outside contractors that are in Philadelphia to do that work?

A. Well, most of them are done by mechanics outside of the place.

Q. Outside?

A. That is, Philadelphia mechanics.

Q. Philadelphia mechanics, and you can't run your shop without the machines running, can you?

A. No.

MR. MASON: That is all.

MR. BRODIE: No further questions.

IRVING GLONNINGER, having been duly sworn, was examined and testified as follows (Tr. pp. 255-270 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Glonninger? Where do you live?

A. 370 West Johnson Street, Germantown.

Q. What is your business?

A. Men's clothing, furnishings and uniforms.

Q. With what company are you associated?

A. Jacob Reed's Sons.

Q. In what capacity?

A. Why, I happen to be general manager of our uniform factory.

Q. Where is your uniform factory located?

A. In the Kirschbaum Building.

Q. How long has it been there?

A. Since May, 1938.

Q. Did you have anything to do with negotiating the lease between Kirschbaum Company and your company?

A. Yes, I was instrumental in the Jacob Reed's Sons becoming interested in the Kirschbaum Building. I didn't actually negotiate the lease.

Q. What influenced you in determining upon the Kirschbaum Building as a location for your uniform factory?

A. Convenience to our store, for one thing, and the fact that it was a building designed for the manufacturing of clothing; the fact, also, that we would be able to get steam. In the building we were formerly located we made our own steam.

Q. Will you please give the nature of the business carried on in your uniform factory, just where you get the goods and how the uniforms are manufactured and what happens to them?

A. Well, we simply make the uniforms at the factory. they are cut in our store, the fourth floor of our store on Chestnut Street.

Q. Yes.

A. And we deliver twice a day in our own truck to the factory the cut goods, along with the trimmings, and then they are made up—

Q. What—excuse me.

A. Sir?

Q. What operations take place at your factory?

A. The actual making of the garments, both coat and trousers and breeches.

Q. And that includes—

A. Overcoats.

Q. Sewing?

A. Yes.

Q. Pressing?

A. Yes.

Q. Finishing?

A. Finishing is done on the outside.

Q. Well, perhaps you and I use that term differently. What do you mean by finishing?

A. Well, finishing is the hand felling of the coats. That is an operation after the coat is finally assembled, after the machine work is done, then it is sent out to the finishers, and then it comes back to us again for pressing, final pressing, and then it is shipped.

Q. Oh, I see, and in the pressing of the garments do you use steam supplied by the building?

A. Yes, sir.

Q. How many pressing machines do you have?

A. Oh, I think we have ten, ten or twelve. I am not just sure of the exact number.

Q. Do you have any other pressing equipment?

A. Yes, we have what we call hand pressing machines, both steam and gas, and we have finish pressing gas irons.

Q. Would it be possible in the operation of your business, Mr. Glonninger, to send the garments out to be pressed?

A. It would be possible, but it wouldn't be practical.

Q. Why not?

A. Well, the expense and inconvenience, and loss of time of doing it, would make such an idea impractical.

Q. Is pressing the very last operation before the garments are shipped?

A. Well, the garments are cleaned after they are pressed, and—no, the buttons are sewed on after the—after the garments are pressed, and then the garments are cleaned, and special tickets sewed on, we make everything to individual measure, that is the measure of our work, and then from that point it is packed and shipped.

Q. For what types of organizations do you manufacture uniforms?

A. Well, we manufacture uniforms for schools, military schools, for Legion Posts, for individual Army, Navy and Marine officers, for hotels, for service stations. They come under the classification of industrial uniforms and military uniforms, commercial uniforms.

Q. Well, what is your largest customer?

A. Well, the United States Naval Academy.

Q. At Annapolis?

A. Yes.

Q. Approximately what percentage of your business is with the United States Naval Academy?

A. Well, I would say approximately somewhere between fifty and sixty per cent.

Q. And do you ship from that factory at Philadelphia to the United States Naval Academy?

A. Yes, sir.

Q. Do you make all shipments of uniforms from your factory in the Kirschbaum Building?

A. Yes, sir, practically all, and in some few, isolated cases we will deliver a completed uniform to our store, where a customer will call for it.

Q. About what percentage—

A. Very small percentage.

Q. —of your business does that consist of?

A. About one per cent, I would say.

Q. Apart from the United States Naval Academy, where are these other organizations—

A. Well,—

Q. —located?

A. The next largest customer is the University of Alabama, Tuscaloosa, Alabama, and most of our business, contract business, is below the Mason and Dixon Line, it is North Carolina, Georgia, Mississippi, Tennessee. We have some business in New England.

Q. Have you any idea what percentage of the finished products that are made at your factory in the Kirschbaum Building goes outside of the State of Pennsylvania from your factory?

A. I would say about eighty per cent.

Q. Is that dollar volume or number of shipments?

THE COURT: Does it really make any difference which it was?

MR. BRODIE: Well,—

THE COURT: Eighty per cent is eighty per cent.

MR. BRODIE: That is true. I just want to anticipate,—

THE COURT: All right.

MR. BRODIE: —in case the defense raises that point. I don't think it makes any difference.

THE COURT: It is pretty substantial any way you look at it.

MR. BRODIE: All right, sir.

By MR. BRODIE:

Q. How frequently do you make shipments out of the State from your factory, or how frequently have you made such shipments during the past two years?

A. We make—

Q. To points outside the State of Pennsylvania.

A. Well, I would say hardly a week goes by that we don't make shipments; in fact, hardly a day.

Q. And how were those shipments made, in what types of containers?

A. Well, we ship in individual boxes that are—if there is more than one garment to be shipped out of the State we will pack the individual boxes in cartons, and if the clothes are to be packed in bulk we will ship them in crates.

Q. What types of carriers do you use to make your shipments?

A. We use railroad, express, occasionally freight, occasionally motor truck, and sometimes our own truck, when it is a question of parcel post delivery.

Q. Do you deliver to the carrier, or does the carrier come to your plant and pick up the merchandise that you are shipping?

A. In every case except parcel post shipments the carrier comes to our plant.

Q. Do you know, Mr. Glonninger, whether or not agents of the carrier call at your plant at regular intervals for the purpose of picking up outgoing merchandise?

A. Yes, they do.

Q. How frequently?

A. Once a day.

Q. At a regular time?

A. Usually around five o'clock, between five and five-thirty.

Q. To the agents of what carriers do you refer when you mention these regular pick-ups?

A. Railway express, for example. That is the one that calls regularly.

Q. Do you know whether the agents of the carriers in removing the outgoing shipments from the premises occupied by you use the elevators?

A. Yes, use one elevator.

Q. They use one elevator?

A. Yes.

Q. Which one is that?

A. Freight elevator.

Q. Do you know what effect a stoppage in the elevator service would have upon your business?

A. It would again inconvenience both us and the carrier.

Q. You referred a little earlier in your testimony to the fact that in the building which you formerly manufactured you supplied your own steam.

A. That is true.

Q. Did you find that as practical and as efficient and as effective a method of operation as obtaining the steam from the building?

A. It is as efficient, but it is much more expensive.

Q. Do you know whether or not it is more dangerous?

A. It probably is more dangerous, because you have

to have a boiler, we had a five-horsepower boiler right on our floor. I assume that it is more dangerous, I imagine the presence of any boiler is dangerous.

Q. Just how is the steam supplied to your plant by Kirschbaum?

A. Yes.

Q. I say, just how is it supplied to your plant by Kirschbaum?

A. Well, it is supplied by lines, pipe lines from the—I am not enough of a mechanic to give you an actual description of how it is supplied, but I know its source is the Kirschbaum Building.

Q. The premises occupied by you are heated, I assume, during the cold weather?

A. Yes, sir.

Q. Who supplies that heat?

A. Kirschbaum Building.

Q. Would it be possible to operate effectively in those premises if they were not heated?

A. No, sir.

Q. Do you know, Mr. Glonninger, how many employees are employed there by your company?

A. Jacob Reed's?

Q. Yes.

A. Why,—

Q. At the factory.

A. We average, I would say, between eight and ninety. We have peak seasons, but we would average that, I think, in the course of the year.

Q. How many would you generally have during the peak season?

A. Well, we sometimes have about one hundred and fifteen, somewhere around there.

Q. Do you know what the approximate annual payroll is for those factory employees manufacturing uniforms at the Kirschbaum Building?

A. I know approximately, yes.

Q. Well?

A. It would be—it would be about—you don't want the finishing pay-roll, of course—it would be about one hundred and twenty thousand dollars.

Q. What is the total annual volume of business that goes out of the factory in the Kirschbaum Building?

A. The total annual volume of Jacob Reed's Sons business?

Q. No, of the uniform business, that is, the total annual volume.

THE COURT: That is what he means, your business.

MR. BRODIE: Your business.

THE COURT: That you do in Kirschbaum.

THE WITNESS: Oh, just in Kirschbaum, what is the total volume?

By MR. BRODIE:

Q. Approximate annual total.

A. About—oh, I would say around twenty thousand units a year.

Q. Well, can you give it to us in dollar value, approximately?

A. Oh, yes, I see what you mean. It is around between five and six hundred thousand dollars.

MR. BRODIE: No further questions.

Cross-examination.

By MR. MASON:

Q. Mr. Glonninger, where does the cloth come from, so far as you are concerned, where do you get it?

A. The cloth?

Q. In the Kirschbaum Building.

A. Well, we—we receive it—you mean where do we receive it?

Q. Where do you receive it from?

A. Oh,

Q. Reed's Store?

A. Yes—well, we receive the cloth at Reed's and cut it there, and then deliver it on our own truck to the factory.

Q. But so far as the operation of the Kirschbaum Building is concerned, the cloth all comes from the Reed plant on Chestnut Street, or the Sansom Street entrance?

A. That is correct.

Q. By a Reed truck, to your place in the Kirschbaum Building?

A. That is correct.

Q. Now, are there any other raw materials that enter into these uniforms other than the cloth which you get from a place in Pennsylvania?

A. Any other raw materials?

Q. Yes, such as silk or other such stuff.

A. I don't know whether I would be qualified to answer that. We have a—what we call our trimming department. The man at the head of that department places those orders. I know that we have to order our trimmings for the uniforms, and—

Q. You don't know whether all that stuff comes from Pennsylvania or not?

A. I know, for instance, in case of buttons, we get a good many buttons from the Waterbury Button Company, in Connecticut, in Waterbury, Connecticut; and we get canvas fronts from a concern in Philadelphia. They are made up, at least, in Philadelphia.

Q. Yes.

A. And our silk is ordered through—I am not just sure of the name. I think it is Holland Company, but I am not—

Q. In Philadelphia?

A. Well, they have a local agent in Philadelphia.

Q. Yes. With reference to the operation itself, how many machines do you have there?

A. Oh, we have—you mean what kind of machines?

Q. Sewing machines.

A. Sewing machines, about thirty.

Q. And what kind of motors do you use, direct or alternating current?

A. We use alternating current.

Q. Alternating current. Do you get all of your electricity, both for light and for power, from the Philadelphia Electric Company?

A. That is correct.

Q. And do you use gas for your pressing irons?

A. We use gas for some irons.

Q. Yes.

A. Yes, we have some under pressing operations, where we use gas, and finish pressing, hand pressing, with gas.

Q. That gas comes from the Philadelphia Gas Works Company?

A. That is correct.

Q. Now, with reference to the repair of your machines, is that done by one of your own employees or is it done by Philadelphia mechanics from outside the fac-

?

A. Both.

Q. Both?

A. We have an operator who is capable of repairing sewing machines. If anything happens to the pressing machines we usually call either an employee in our store who is capable of doing that work, or an outside contractor.

Q. Outside contractor. Thank you, that is all.

Re-direct-examination.

By Mr. Brodie:

Q. I have just one or two questions. Do you know, Mr. Glonninger, where Jacob Reed's Sons gets the cloth which comes to its Chestnut Street store?

A. Well, they get some, both—

By Mr. Mason:

Q. Well, do you know, Mr. Glonninger?

A. What?

Q. The question was, do you know?

A. Oh, I know in some cases, yes.

By Mr. Brodie:

Q. All right, where?

A. Well, we get some of our cloth from New England, some from Ohio and some from Pennsylvania; some from Philadelphia, as a matter of fact.

Q. This silk which you describe as ordered through a Philadelphia agent, do you know from where it is shipped?

A. I believe—well, I really don't know. I am not capable of answering that question.

Q. All right, sir.

A. Not qualified to answer.

Q. Do you know whether the local agent through which you place your orders for silk is an agent for an out of State—that is, out of the State of Pennsylvania—

A. I believe—

Q. —company?

A. I believe he is. I believe his home company is in New York.

Q. The under pressing and finishing irons to which you referred as using gas, do they also use steam?

A. No, sir.

Mr. Brodie: That is all.

I offer into evidence this lease between the defendant and Jacob Reed's Sons.

(Lease of Jacob Reed's Sons with A. B. Kirschbaum was marked Exhibit P-7.)

Frederick L. Hewes, having been duly sworn, was examined and testified as follows (Tr. pp. 270-285 inc.):

Direct-examination.

By Mr. Brodie:

Q. Mr. Hewes, where do you live, please?

A. Philadelphia.

Q. What is your business?

A. I am an executive for a clothing manufacturer.

Q. With what clothing manufacturer are you connected?

A. With the Progressive Clothing Manufacturing Company.

Q. In what capacity?

A. General manager.

Q. Where is the plant of the Progressive Clothing Manufacturing Company?

A. In the southeast corner of Broad and Carpenter.

Q. Is that in the Kirschbaum Building?

A. In the Kirschbaum Building.

Q. On what floor?

A. The third and fourth floors, part of the fourth floors.

Q. What kind of clothing is manufactured by your company?

A. Men's and young men's coats, pants, vests, topcoats, ovefcoats, some uniforms.

Q. Will you please describe to the Court just what operations take place at your plant in the Kirschbaum Building.

A. Well, from cloth we cut patterns and sew the garments and deliver them to our various customers.

Q. You cut the cloth there?

A. Yes.

Q. When the cloth comes in to you is it ready for cutting or must it be sponged and shrunk?

A. For the most part it must be examined, sponged and finished.

Q. Do you do that sponging and shrinking at your plant in the Kirschbaum Building?

A. Yes, sir.

Q. Do you have a sponging machine?

A. Yes, sir.

Q. How does that machine operate?

A. Well, it operates from a perforated cylinder in which live steam is allowed to permeate the cloth.

Q. Where do you get the live steam which you use in that machine?

A. It is supplied by the Kirschbaum Building.

Q. Can you tell me approximately how many yards of cloth you sponge weekly in that machine, and have during the last two years?

A. Oh, about, let's see—oh, about seventy-five hundred to—seventy-five hundred yards.

Q. Approximately an average of seventy-five hundred yards?

A. Yes.

Q. Weekly. Could that sponging machine be operated without live steam?

A. No, sir.

Q. In your operations in the manufacture of clothing do you also press garments?

A. Yes, sir.

Q. How many pressing machines do you have?

A. Oh, in operation, I should say seventy-five, seventy-five to a hundred.

Q. And how are they operated?

A. Some steam, some gas.

Q. For those which are operated by steam, does the Kirschbaum Building supply the steam?

A. They do.

Q. Do you know at what pressure?

A. About ninety pounds.

Q. Do you know, Mr. Hewes, whether during the last two years steam has been kept up continuously in those machines or whether it is shut off at times, and if so, when is it shut off?

A. Well, at the present time the steam is shut off over the week ends, Saturdays and Sundays.

Q. And how about the rest of the week?

A. The rest of the week it is on twenty-four hours a day.

Q. At ninety pounds?

A. Yes.

Q. Where do you get the cloth which you cut and manufacture into men's clothing?

A. Well, from mills located in various places.

Q. How frequently are shipments of cloth made to your plant and received by you?

A. Daily, I would say.

Q. Do you know whether those shipments come from points inside Pennsylvania or from points outside Pennsylvania?

A. Well, they come from both inside and outside.

Q. Have you any idea what percentage comes from points outside Pennsylvania?

A. I should say about seventy-five per cent would come from outside of the State.

Q. From outside Pennsylvania. Does a week ever pass, Mr. Hewes, during which you do not receive shipments of cloth from outside Pennsylvania?

A. I would say no.

Q. Where do you get your buttons and trimmings?

A. Various sources.

THE COURT: How many more of these tenants have you?

MR. BRODIE: I believe this is the last one, Your Honor.

THE WITNESS: Various sources.

By MR. BRODIE:

Q. Do you get any from points outside the State of Pennsylvania?

A. Why, yes, I imagine so. I couldn't state positively, though, where they came from.

Q. Now, this cloth which comes in to you, in what types of containers is it delivered?

A. In bales, bundles, cases.

Q. Are they bulky and heavy, generally?

A. Yes.

Q. How are they brought up to your premises, by the staircase or on the elevators?

A. On the elevators.

Q. Does the carrier deliver it directly to your premises or to the unloading platform downstairs?

A. Generally to our premises.

Q. How frequently do you make outgoing shipments?

A. Daily.

Q. Approximately what percentage of your finished products is sent outside the State of Pennsylvania?

A. Oh, I would say about seventy-five or eighty per cent.

Q. And how frequently do you make shipments outside the State, and how frequently have you made such shipments during the last two years?

A. Daily.

Q. How are these garments shipped, in cases, or racks, or in various ways?

A. Well, in various ways.

Q. Do you ever ship on racks?

A. Sometimes.

Q. About how many garments on a rack?

A. Twenty to thirty.

Q. Do you ever ship in wooden cases?

A. Yes, sir.

Q. About how large are those wooden cases?

A. They vary from one hundred pounds to ten hundred pounds.

Q. Are they picked up at your plant by the carrier or are they brought downstairs and delivered by you to the carrier?

A. They are picked up by the carrier on our floor.

Q. What carriers do you use to make outgoing shipments?

A. Railway express, fast freights, Pennsylvania Railroad and local truckmen.

Q. Do you have agents of carriers calling regularly at your plant to make shipments?

A. Yes, sir.

Q. How frequently?

A. Daily.

Q. At regular times?

A. At regular times—well, not—they may come whenever you call them.

Q. Well, do you have any that come without being called, that make a regular pick-up?

A. Yes.

Q. Which one?

A. Well, most of the motor freights or the fast freights, you have to give them a special call to have them pick up.

Q. How about the Railway Express?

A. They call daily.

Q. Now, what do you manufacture on the fourth floor?

A. At present we are manufacturing uniforms, Government uniforms, and trousers.

Q. From where are the shipments of goods manufactured, on the fourth floor, from the fourth floor or from the third floor?

A. Would you mind repeating the question?

MR. BRODIE: Will you repeat the question, Mr. Stenographer?

(The question was repeated by the reporter as follows:

"Q. From where are the shipments of goods manufactured, on the fourth floor, from the fourth floor or from the third floor?")

A. Well, we ship from both the third and fourth floor.

By MR. BRODIE:

Q. Do you ever send goods up to the fourth floor and bring goods down from the fourth floor to the third by elevator?

A. Yes, sir.

Q. Use the elevators for transportation between floors?

A. We do.

Q. Do you also use the elevators to go to and from your place of business?

A. In part.

Q. Well, you say in part; will you explain that?

A. Well, some—some employees use the elevators, others use the stairways, to the third floor. They all use the elevators to the fourth floor.

Q. Do you know whether the reason why some of the employees use the stairways to go to the third floor is because the elevator capacity is not great enough?

A. I would say that would be the reason.

Q. Does the building have a watchman?

A. Yes, sir.

Q. Do you rely upon that watchman? Does your company rely upon that watchman to any extent?

A. Yes, sir.

By The Court:

Q. Do you have your own watchman, too?

A. No, sir, we don't have our own watchman.

By Mr. Brodie:

Q. Would you adopt other means to protect your plant if the building did not supply watchmen?

A. Undoubtedly.

Q. Sir?

A. Undoubtedly.

Q. How many employees do you have?

A. It varies; about four hundred.

Q. Working in the Kirschbaum Building?

A. Yes, sir.

Q. Approximately what is the annual volume of business that your company does?

A. It would be over a million dollars a year.

Q. Can you give us an approximate idea of the annual pay-roll that your company has?

A. It would be between four hundred and five hundred thousand dollars a year.

Q. Are the premises which you occupy heated during the cold weather?

A. Yes, sir.

Q. Who supplies that heat?

A. The building.

Q. Could you operate effectively if the building did not supply heat?

A. No, sir.

Mr. Brodie: I offer this lease into evidence. Is there any objection, Mr. Mason?

Mr. Mason: No.

(Lease of Progressive Clothing Manufacturing Company with A. B. Kirschbaum was marked Exhibit P-8.)

MR. BRODIE: I have no further questions.

Cross-examination.

By MR. MASON:

Q. Mr. Hewes, one of the last subjects of inquiry was this watchman service. Is all of your space protected by the watchmen furnished by the building, or do you have it protected otherwise?

A. Not all, we have part protected by Holmes Electric.

Q. So that when you said you did not hire your own watchman, that did not mean that you did not have other protection than that which the building furnished. You have the Holmes Service?

A. For part of the premises.

Q. For part. That part is not watched or entered by the building watchmen at all, is it?

A. Not after it is closed.

Q. Not after it is closed, and I presume it would be possible to include or to extend that Holmes Service to all of your space, wouldn't it?

A. I am not sure.

Q. Not sure, but I think you said that if the building did not furnish as part of the building services a watchman you would have your own watchman?

A. Well, if you consider the Holmes Electric Protection a watchman, yes.

Q. Well, I meant to say, if you could not extend that to cover the whole of your space, and the building did not watch the rest of it, you would have your own man, wouldn't you?

A. I believe—we most certainly would have it protected in some way.

Q. With reference to your outgoing shipments, I understood you to say that approximately seventy-five to eighty per cent was shipped in various ways outside Pennsylvania. Now, the balance of it is traded inside of Pennsylvania?

A. Yes, sir.

Q. And how is that shipped?

A. Well, that is shipped parcel post, Railway Express, motor freight, railroad.

Q. Now, there is a certain proportion of it which is shipped by local truckmen, is there not?

A. Yes, sir.

Q. In Philadelphia, and do those local truckmen take the packages, we will call it, or racks, from your place of business?

A. They take it from our premises.

Q. And they deliver it to your customers?

A. That is right.

Q. And if all of your local business happens to be waiting for delivery, and the local truckman does not get there, it interferes with your business going out, doesn't it?

A. It would.

Q. With reference to your machines, I mean your sewing machines and the motors that turn them, are they controlled by direct or alternating current?

A. By alternating current.

Q. And you buy your power from the Philadelphia Electric Company?

A. Yes.

Q. Do you get light also from the Philadelphia Electric Company?

A. Yes, sir.

Q. What about gas? Do you use any gas?

A. Yes, sir.

Q. And you get that from the local gas company?

A. Philadelphia Gas.

Q. Yes.

A. United Gas, I guess.

Q. Concerning the shipments, how did you say that the goods were shipped, some in cartons, some in wooden cases, some on racks?

A. Yes, sir,—shipments outward or inward, are you speaking of?

Q. Out.

A. Yes, sir.

Q. Inward they come to you in whatever form the shipper sends them to you, I suppose?

A. Yes.

Q. Now, with reference to your outgoing shipments, do you make your boxes?

A. Partly.

Q. Partly. Where do you get your material to make your boxes from, Philadelphia or elsewhere?

A. Well, partly from Philadelphia and partly elsewhere.

Q. And what do you do about your racks, do you own the racks, or do you hire them, or do your customers have them?

A. We own them, for the most part.

Q. You own them, and where do you get your racks from, Philadelphia or elsewhere?

A. Well, we have made most of them ourselves.

Q. Most of them yourselves. Those that you don't make, you buy?

A. Well, we haven't had occasion to buy any.

Q. Haven't had occasion. Where do you get the material that you make your racks out of?

A. Philadelphia.

Q. And that material is necessary to make the racks, isn't it? You don't make the material as well as the racks, do you?

A. No, sir.

Q. They are metal racks, are they not, or wood, which?

A. They are—well, we have some—you wouldn't call them racks, most of the racks are made from metal.

Q. Metal, yes.

A. Pipe.

Q. I am not clear, Mr. Hewes, whether you told Mr. Brodie that the gas—how the gas was used. What do you use gas for?

A. We use gas for processing, for pressing.

Q. When you say processing, do you mean anything other then pressing?

A. Well, the machinist might use it for a Bunsen burner.

Q. I see, that is, it might be used in your machine shop, when you were making racks, or other such things?

A. Yes, sir.

Q. But to do those things you need the gas, do you not?

A. Yes, sir.

MR. MASON: That is all.

MR. BRODIE: No further questions.

* * * * (Tr. pp. 285-326 inc.)

DEFENDANT'S EVIDENCE.

EDWIN G. FRANK, having been duly sworn, was examined and testified as follows (Tr. pp. 327-330 inc.):

Direct-examination.

By MR. MASON:

Q. Mr. Frank, you are an officer of the Kirschbaum Company, are you not?

A. I am the building, so-called building manager; not an officer.

Q. Are you interested in the company as a stockholder?

A. I have a few shares, yes.

Q. And you are familiar with the history of the company in its relation to the building?

A. I am.

Q. Do you know the business in which the company has been and is now engaged?

A. I do.

Q. Can you tell me when the company—or, let me ask you this, what is the company's business at the present time?

A. The company's business is leasing space to manufacturers or—well, anybody who wants space. I wouldn't say necessarily; it happens that they are all manufacturers.

Q. Yes.

A. It is a loft building, what in New York would be termed a loft building.

Q. And in the course of that business does the company have any other space to offer than that in what we have called the Kirschbaum Building?

A. Well, in connection, next door to the Kirschbaum Building is a small shop, which is actually a part of the premises, but not directly connected with the building.

Q. Now, does the company engage in any business other than that of being a landlord and leasing to tenants the space in this building?

A. None whatever.

Q. And do you recall when it ceased doing its manufacturing or other businesses?

A. In the—I can't give you the exact date—in the fall of 1938.

Q. Fall of 1928. Can you tell us whether or not the Kirschbaum Company has any interest in the manufacturing or other activities of its tenants,—

A. No.

Q. —or whether it is solely that of landlord?

A. Solely that of landlord.

Q. You are a director in the company, are you not?

A. No, I am not a director.

Q. You are not?

A. Oh, that is a mistake, I take that back, I am a director, but not one of the officers.

Q. Not an officer.

Mr. Mason: From this witness, or from the record, Mr. Brodie, I was going to put in the length of time these various people were employed.

(Discussion off the record.)

Mr. Mason: I was going to ask the witness the length of time that each of these employees had been in the service of the Kirschbaum Company.

The Court: Yes, have you got a written statement?

Mr. Mason: I will just read it into the record.

The Court: Oh, yes.. You listen to this and see if it is correct.

Mr. Mason: William Mentzel, approximately twenty years.

McKinley Edwards, twenty years.

Peter Rock, ten years.

Coleman Rucker, thirty-five years.

George E. Simon, eighteen years.

Harry J. Gallagher, ten years.

George Epps, ten years.

Samuel H. Fleming was employed for eight years, but is no longer in the employ of the company, as I understand.

Nicholas Cattelise, who was on the stand, testified he began his employment this year, 1940, January, 1940.

And Clarence Berkeley, to complete the list, was in the employ of the company for a year and a half, and is now no longer employed.

By The Court:

Q. Is that a correct statement?
A. That is a correct statement.

* * * (Tr. pp. 330, 331.)

Defendant Rests.

Mr. Mason: It is my purpose to make a motion for judgment for the defendant. Whether Your Honor cares to rule on those other motions first, or just hold them in reserve also, is a matter of immateriality.

The Court: Oh, we will hold them, because I don't think any of them involve anything very vital.

* * * (Tr. pp. 331-336 inc.)

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed May 20, 1941.)

I.

PROPOSED FINDINGS OF FACT.

1. Defendant, A. B. Kirschbaum Company, is a Pennsylvania corporation.

2. Defendant is the owner of a six story and basement factory building situated at Broad and Carpenter Streets, Philadelphia, Pennsylvania, which was formerly

occupied by defendant as a factory for the production of men's clothing. Defendant ceased its manufacturing operations some time ago and now leases space in the building to tenants who are engaged in manufacturing activities.

3. Seven of the occupants of defendant's building, occupying space on all floors, are engaged in the manufacture and sale of men's and boys' clothing, boys' wash suits, uniforms, pants, sweaters and other articles of clothing; 70 to 85 percent of the goods produced by the tenants are shipped directly in interstate commerce to points outside the State of Pennsylvania.

4. The aforesaid tenants and occupants of defendant's building receive large amounts of raw materials, semi-finished and finished goods which are shipped to them in interstate commerce from points outside the State of Pennsylvania. Seventy to 95 percent of the incoming goods received by the tenants originate outside of the State of Pennsylvania.

5. Deliveries of incoming goods to the tenants and shipments of outgoing products by the tenants occur daily with respect to most of the aforesaid tenants, and, with respect to the others of the said tenants, occur at least once a week.

6. Defendant employs one engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter and a carpenter's helper.

7. The engineer operates the house, sewer, elevator, fire and vacuum pumps in the building and also takes care of the pumps which draw water through the heating system, feed water into the boilers, and pump the cellar dry after the boilers are blown out with "live" steam. In addition the engineer keeps the elevators in repair and

periodically packs the elevator cylinders. Furthermore, the engineer supervises the proper operation and repair of the fire and sprinkler tanks and sees that the radiators are adequate to provide heat throughout the building.

8. The firemen fire and keep in operation three boilers in the building. They produce steam for heating the common portions of the building and the tenants' premises. Without heat the tenants would be unable to conduct their manufacturing operations efficiently, if at all, in the winter months.

The firemen also produce high pressure or "live" steam which is used by six of the tenants to operate over 140 pressing machines employed to press semi-finished and finished garments produced for commerce by the tenants. The "live" steam is also used by two tenants for shrinking and sponging raw and semi-finished materials prior to the completion of the garments manufactured for commerce by such tenants. Without such "live" steam these tenants would be unable to operate their pressing and sponging machines and, consequently, would be unable to complete the manufacture of the garments they make.

The steam produced by the firemen is also used to operate the hydraulic pumps which keep the passenger and freight elevators in operation. Without such steam supplied at the proper pressure the elevators would cease functioning.

The steam produced by the firemen is also utilized to operate machines owned by defendant which generate direct current electricity. This electricity is employed to light the common portions of the building and is also supplied to two tenants for the lighting of their premises during the working day and to another tenant for the operation of 45 sewing machines used by it in its manufacturing operations. Without such direct current these sewing machines could not be operated.

9. Defendant's elevator operators operate two freight elevators and one passenger elevator. The operators of the freight elevators carry goods originating outside the State up to the premises of the various tenants and carry down from the premises of the tenants goods which have begun their journey to points outside the State. Incoming goods moving in interstate commerce are delivered by common and contract carriers directly to the tenants at their premises and outgoing goods are picked up by such carriers at the premises of the tenants for shipment in interstate commerce.

10. Deliveries of incoming goods and shipments of outgoing products are made via the freight elevators and occur regularly and in large amounts every day. Such deliveries and shipments are made in cartons, bales, packing cases, wooden crates and racks weighing from 100 to 1,000 pounds. The size and weight of these deliveries and shipments are so great as to render impossible their being carried to or from the tenants' premises by means of the stairways. If the freight elevators were not operated the tenants would be unable to receive or make shipments and thus would be unable to continue production in defendant's building.

11. The operator of the passenger elevator conveys the tenants' employees to and from work and carries buyers, salesmen, visitors and actual and potential customers to and from the premises of the tenants.

12. One of the elevator operators also removes trash, refuse and waste materials from outside the premises of the tenants. The trash is placed by the tenants near the elevator entrances and fire escapes and accumulates in substantial amounts. Removal of the trash from the elevator entrances and fire escapes facilitates the movement of the goods to and from the premises of the tenants and acts as a safeguard against what would otherwise constitute a serious fire hazard.

13. Defendant employs two regular watchmen and two of the elevator operators also serve as watchmen once or twice a month. The watchmen stand guard in the yard, collect passes from outgoing employees, see that no packages are taken out without proper authority, that strangers are not admitted to the building, and that delivery and pick-up trucks keep moving. In addition, the watchmen make hourly rounds of the building, including the premises of each of the tenants. They turn out lights, close windows, watch for leaks in radiators and in the tenants' machines and do whatever is necessary to prevent or control such leaks. They take necessary preventive measures against fire hazards and guard against thefts of the tenants' goods and equipment. Finally, the watchmen turn on the heat in the boiler room and throughout the building each morning in preparation for the tenants' production operations.

14. The porter, carpenter and carpenter's helper clean, repair and maintain the halls, stairways and other common portions of the building which are utilized by the tenants.

15. Most of defendant's employees have been employed by defendant for many years, including the period in which defendant itself engaged in manufacturing operations in the building. During that period the employees were engaged in substantially the same duties they have been performing since defendant ceased manufacturing and rented its premises to others.

16. All of defendant's employees are engaged in activities or occupations which are necessary to the production of goods for commerce carried on by the tenants.

17. From 1927 to 1939 there were 103 strikes throughout the country involving building service and maintenance employees. Of these 40 involved disputes over wages

and hours. Out of a total of 70,737 employees who struck 49,722 did so because of unsatisfactory wage and hour conditions. During these strikes an aggregate of 673,447 man-days was lost and of this amount 539,766 man-days were lost in strikes involving disputes over wages and hours.

18. In February, 1939 a strike arising from a dispute involving wages and hours was called by maintenance and service employees in loft buildings in the garment producing area of New York City. These employees performed functions substantially identical with those performed by defendant's employees. The stoppage of elevator service and in the supply of heat and "live" steam prevented employees and customers of the tenants in the struck buildings from reaching their premises and caused a cessation in the production of goods for interstate commerce by the tenants.

The breakdown in elevator service also disrupted the interstate transportation of goods consigned to the tenants and produced by the tenants for shipment in commerce.

Further, the New York strike impeded production for commerce carried on in other states. Many manufacturers in the New York garment area have their goods processed by contractors in other states and the cessation of production in New York resulting from the strike caused production by the out-of-state contractors to be similarly disrupted.

19. During the period from October 24, 1938 until October 24, 1939 defendant paid many of its employees who were engaged in the activities described less than 25 cents an hour; and during the period from October 24, 1939 until the date this action was filed defendant paid many of its said employees less than 30 cents an hour.

20. During the period from October 24, 1938 until October 24, 1939 defendant employed many of its afore-

said employees for workweeks longer than 44 hours, and during the period from October 24, 1939 until the date of the filing of this action defendant employed many of its aforesaid employees for workweeks longer than 42 hours, without paying overtime compensation for the hours in excess of the said number of hours at rates not less than one and one-half times the regular rates at which said employees were employed.

II.

PROPOSED CONCLUSIONS OF LAW.

1. The freight elevator operators employed by defendant are engaged in interstate commerce.

2. All defendant's employees are engaged in the production of goods for interstate commerce.

3. Defendant is subject to the provisions of the Fair Labor Standards Act and its employees are entitled to the benefits of said Act.

4. Defendant has violated Section 15(a) (2) of the Fair Labor Standards Act in that it has failed to pay many of its employees engaged in commerce or in the production of goods for commerce the minimum wages required by Section 6 of the Act and has failed to pay the overtime compensation required by Section 7 of the Act.

5. Defendant's employees are not engaged in a service establishment within the meaning of Section 13(a) (2) of the Act.

6. The Fair Labor Standards Act is a valid exercise of the power of Congress to regulate commerce.

7. The Act does not violate the due process clause of the Fifth Amendment.

8. The Act does not violate the Tenth Amendment.

9. Plaintiff is entitled to an injunction enjoining and restraining defendant from violating the provisions of Section 15(a) (2) of the Act.

OPINION OF THE DISTRICT COURT SUR PLEADINGS AND PROOFS.
(Filed Apr. 2, 1941.)

Before KIRKPATRICK, *J.*

This is an action under the Fair Labor Standards Act (Sec. 17) to enjoin certain violations of Secs. 6 and 7. The defendant concedes that, as to certain of its employees, it has not complied with the requirements of these sections.

The constitutionality of the Act having been established by the Supreme Court in U. S. v. F. W. Darby Lumber Co. (February 3, 1941), the only question to be decided is whether it is applicable to this defendant.

The defendant is the owner of a six story loft building in Philadelphia, portions of which it leases to manufacturing concerns, most in the clothing business. The tenants are engaged in interstate commerce, but the defendant has no interest in the business of any of its tenants.

As part of the consideration for the rent, the defendant furnishes the services of three elevator operators, two watchmen, three firemen, an engineer, a carpenter and a carpenter's helper, and a porter or cleaner, all of whom are employed and paid by it. It also employs a cashier and bookkeeper who are not involved in this proceeding. The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. The watchmen pass through the building, closing

windows, putting out lights, guarding against fires, etc. The engineer supervises the operation of the boilers, which produce steam used by some of the tenants in their manufacturing operations, the various pumps in the building, and the production of direct electric current which is used to light the building and is also used by two of the tenants; he also keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps which the engineer is called to another part of the building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, staircases, etc.

In general it may be said that the defendant through the above listed employees, heats the building, keeps it in repair, furnishes steam and direct electric current to those of its tenants who desire it, cleans those portions of the building which are not leased, and provides means of ingress and egress for its tenants, their employees, and for property being shipped to and by them. The defendant has no business, activities, or source of revenue other than those which are connected with its ownership and leasing of the building.

In U. S. v. Darby Lumber Company, the Supreme Court stated the objectives of the Act. "As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce.". This epitomizes the declaration of policy contained in Sec. 2.

It is within the constitutional power of Congress to protect commerce against such dislocation. Specifically, Congress may exercise this power, either by excluding

from interstate transportation goods produced under substandard conditions or by suppressing production of such goods, or by doing both. The second method of implementing its power is sustainable independently of the first. All this is expressly ruled in the opinion of the Court.

The boundaries within which Congress may exercise its power to suppress production of condemned goods have not been precisely fixed by the Supreme Court. Congress itself has asserted the extent to which it proposes to exercise this power, by declaring in Sec. 3(j) of the Act that an "employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any . . . occupation necessary to the production thereof." Congress may exercise any of its powers to their full extent. Production is a term hardly easier to define precisely than commerce, but, granted the power to regulate or wholly suppress production for the purposes of the act, I do not think that Congress transgressed constitutional limitations in undertaking to deal with certain marginal activities so closely related with production that without regulating them there cannot be a plenary exercise of the power. This relationship is expressed in the phrase, "necessary to the production".

The activities of the employees involved in this case are, in my judgment, necessary to the production of the goods intended for interstate commerce manufactured by the tenants of the building, and I so find. The definition of "necessary" given by Chief Justice Marshall is fairly applicable. "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." McCulloch v. Maryland, 4 Wheat. 315, 413. The employees involved here can not be excluded from the operation of the Act unless the word necessary is interpreted to mean indispensable. So to do

would be to deny a liberal construction to a remedial act, contrary to the fundamental canon for the interpretation of statutes. See Wood v. Central Sand and Gravel Co., 33 F. Supp. 40. Since the Darby case and its express disavowal of so much of Carter v. Carter Coal Co., 298 U. S. 238, as is inconsistent with it, I find no basis for the defendant's interpretation which in effect would limit the employees subject to the Act to those who work upon or have physical contact with the article which will later move into commerce.

The argument is made that the word "employer" appearing in Sec. 6 and Sec. 7 must be construed to mean an employer who is a member of an "interstate industry," that only such employers are required to pay minimum wages and otherwise conform to the Act, and that an employee engaged in an occupation necessary for the production of goods for interstate commerce is not covered by the Act unless the whole industry of which his employer is a member can fairly be said to be an industry engaged in interstate commerce or in the production of goods for such commerce.

It may be conceded that renting buildings—the industry in which this employer is engaged—is not an "industry engaged in commerce or in the production of goods for commerce," and that Secs. 5 and 8, providing for industry committees and wage orders, cannot be applied to it. It does not follow, however, that Sec. 6 and Sec. 7, merely because they provide that the progressive increases in the minimum standards ordained to occur at definite future times may be accelerated in some, but not all, industries by administrative orders, must be limited by construction to only those industries as to which such orders can be made.

Another argument is based upon the legislative history of the Act. It turns upon the fact that bills were passed both by the Senate and the House, and subsequently changed by a conference report, which was adopted in both Houses, and which contained the text of

the law as passed. It is a fact, as stated in the conference report, that the House Bill affected only employers who were members of an industry engaged in interstate commerce, and so the character of the industry, as a whole, of which the employer was a member was made the first test of the applicability of the Act to any employee. This limitation was eliminated by the conference report. The bills as passed in Sec. 6 and Sec. 7 say "every employer," and "no employer." The defendant argues that the Senate Bill by its statement of policy impliedly contained the same limitations as the House Bill, and that, since both bills had contained the limitation, there being no disagreement upon this point, the fact that the bill reported from conference did not contain it is no indication of an intention to abandon it, but the contrary. But I do not think that the Senate Bill can be read as containing the limitation, and the conclusion which I draw from legislative history of the Act is that in its final enactment it was intended to cover all employers with the exception of those specifically exempted by Sec. 13, regardless of the general characteristics of their industry. It is thus the nature of the employee's occupation which determines whether or not the employer is, so far as the employee is concerned, subject to the Fair Labor Standards Act. Sunshine Mining Co. v. Carver, 34 F. Supp. 274.

The remaining question is whether the defendant here comes within the specific exemption of Sec. 13(a) (2) as a "service establishment". There is a further limitation that if so, the greater part of such servicing must be in intrastate commerce, but unless the employer can be classified as a service establishment, this second requirement is unimportant. Unquestionably, most if not all of the work done by the employees in this case could be properly described as servicing. But the defendant's business is primarily leasing a building for manufacturing purposes. It sells or rents space. In order to pro-

mote its business it offers certain services to be rendered by some of its employees. The test, however, must be the primary business of the employer, not the particular occupation of the employee, for the exemption relates to employers only. It has been held that a business of this kind is a "manufacturing establishment" (Barfoot v. White Star Line, 170 Mich. 349). It is not necessary, however, to go so far. Nor is it necessary to hold as the Government contends, that a service establishment within the meaning of the Act is one which possesses essentially the same characteristics as a retail establishment. However the defendant's business may be classified, it is not in my opinion a service establishment.

Findings of Fact.

The facts stated in the foregoing opinion may be taken as special findings of fact. In addition, the plaintiff's requests for fact findings Nos. 1 to 16 inclusive are affirmed by the Court and adopted, to which is added the further finding that the defendant between October 24, 1938, and October 24, 1939, has violated Secs. 6 and 7 of the Fair Labor Standards Act in its payment of wages and its hours of employment in respect of the employees referred to in these findings. In view of the defendant's concession, it is unnecessary to find the precise extent of the violations.

Ruling on Evidence.

The defendant's objection to the evidence offered by the plaintiff to establish the facts contained in its 17th request for fact finding is sustained.

Conclusions of Law.

The plaintiff's request for conclusions of law are all affirmed.

Judgment for the plaintiff in accordance with the prayer of the complaint.

JUDGMENT.
(Filed April 28, 1941.)

This case coming to be heard upon testimony submitted by both parties, and the Court having found that the employees of the defendant involved in this case are engaged in commerce or in occupations necessary to the production of goods for interstate commerce manufactured by tenants of the defendant's building, and that the business of the defendant is not that of a service establishment within the meaning of Section 13(a) (2) of the Fair Labor Standards Act of 1938, and that the defendant has violated Sections 6 and 7 of the Fair Labor Standards Act of 1938 in its payment of wages with respect to the employees involved in this action, and that the plaintiff is entitled to a judgment in accordance wtih the prayer of the complaint.

Now, Therefore, upon motion of the attorneys for plaintiff, it is

Ordered, Adjudged and Decreed that defendant, its agents, servants, employees, officers and attorneys, and all persons acting or claiming to act in its behalf and interest, be, and they hereby are, permanently enjoined and restrained from:

(1) Violating any of the provisions of Section 15(a) (2) of the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.*, hereinafter referred to as the Act;

(2) During the period from the date of this judgment to October 24, 1945, paying any of its employees employed as elevator operator, watchman, fireman, engineer, carpenter, carpenter's helper, porter or cleaner, at its place of business, Southeast Corner of Broad and Carpenter Streets, Philadelphia, Pennsylvania, wages at rates less

than thirty cents (30¢) an hour; or, after October 23, 1945, paying any of its said employees employed as aforesaid, wages at rates less than forty cents (40¢) an hour, or the rate (not less than thirty cents (30¢) an hour) prescribed in any applicable order of the Administrator of the Wage and Hour Division, United States Department of Labor, issued pursuant to the provisions of Section 8 of the Act, whichever is lower; or, at any time, paying any of its said employees, employed as aforesaid, wages at rates less than the rate (not in excess of forty cents (40¢) an hour) prescribed in any applicable order of the said Administrator issued pursuant to the provisions of Section 8 of the Act, contrary to the provisions of Sections 6 and 15(a) (2) of the Act;

Nothing contained in this judgment shall be construed to prohibit the payment of wages at rates less than those prescribed above to any employee for whom the said Administrator has issued a special certificate pursuant to the provisions of Section 14 of the Act; and

(3) Employing any of its employees, employed as aforesaid, for a workweek longer than forty (40) hours, unless such employee receives compensation for his employment in excess of forty (40) hours in such workweek at a rate not less than one and one-half times the regular rate at which he is employed, contrary to the provisions of Sections 7 and 15(a) (2) of the Act.

Dated: April 28, 1941.

/s/ W. H. KIRKPATRICK,
United States District Judge.

EXCEPTIONS ON BEHALF OF DEFENDANT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINED IN THE OPINION OF THIS COURT FILED APRIL 2, 1941, AND TO JUDGMENT DATED APRIL 28, 1941.

(Filed April 28, 1941.)

To: Honorable William H. Kirkpatrick, Judge of the United States District Court for the Eastern District of Pennsylvania.

A. B. Kirschbaum Company, through its attorneys, Sidney L. Krauss, Esq., and Wm. Clarke Mason, Esq., hereby notes the following exceptions to the Findings of Fact and Conclusions of Law contained in the opinion of said Court filed on or about April 2, 1941, and to the judgment dated April 28, 1941, in the above matter.

First: Exceptions as to Findings of Fact.

The Court erred in making the following Findings of Fact:

(a) In affirming and adopting plaintiff's requests for Findings of Fact Nos. 4, 8, 9, 10 and 16; and

(b) in finding that "the defendant between October 24, 1938 and October 24, 1939, has violated Secs. 6 and 7 of the Fair Labor Standards Act in its payment of wages and its hours of employment in respect of the employees" referred to in the opinion of said Court filed April 2, 1941.

Second: Exceptions as to Conclusions of Law.

The Court erred in making the following Conclusions of Law:

(a) In affirming plaintiff's requests for Conclusions of Law Nos. 1 to 9, inclusive;

(b) In granting judgment for the plaintiff in accordance with the prayer of the complaint; and

(c) In making the following Conclusions of Law contained in the opinion of the Court filed April 2, 1941:

(i) "The activities of the employees involved in this case are, in my judgment, necessary to the production of the goods intended for interstate commerce manufactured by the tenants of the building, and I so find."

(ii) "The employees involved here cannot be excluded from the operation of the Act unless the word 'necessary' is interpreted to mean indispensable."

(iii) "I find no basis for the defendant's interpretation which in effect would limit the employees subject to the Act to those who work upon or have physical contact with the article which will later move into commerce."

(iv) "The conclusion which I draw on the legislative history of the Act is that in its final enactment it was intended to cover all employers, with the exception of those specially exempted by Sec. 13, regardless of the general characteristics of their industry."

(v) "However the defendant's business may be classified, it is not in my opinion a service establishment."

Third: Exceptions as to judgment of April 28, 1941.

The Court erred in making and causing to be entered

the above judgment and in refusing to grant defendant's motion for judgment.

Signed: /s/ SIDNEY L. KRAUSS
Attorney for Defendant,
Address: 1113 North American Building
Philadelphia, Penna.
Signed: /s/ WM. CLARKE MASON,
Attorney for Defendant,
Address: 2107 Fidelity-Phila. Tr. Bldg.,
Philadelphia, Penna.

Dated: April 28, 1941.

ORDER SUSPENDING INJUNCTION PENDING APPEAL.

(Filed Apr. 28, 1941.)

Upon consideration of the motion of defendant-appellant, A. B. Kirschbaum Company (hereinafter referred to as "defendant"), filed herein April 28, 1941, it is

ORDERED, ADJUDGED AND DECREED that the injunction granted by this Court against the defendant, A. B. Kirschbaum Company, in the judgment of this Court made and entered in the above entitled proceedings on April 28, 1941, be and the same is hereby suspended and stayed pending final determination of the appeal taken by the defendant from the aforesaid judgment of this Court to the United States Circuit Court of Appeals for the Third Circuit and that pending final determination of the appeal aforesaid, the defendant, A. B. Kirschbaum Company, shall not be required to comply with any of the provisions of said injunction or the judgment granting the same; *Provided However*, that the said defendant, A. B. Kirschbaum Company, first give security in the sum of One Thousand Dollars ($1,000.) in the form and manner required by law.

/s/ W. H. KIRKPATRICK,
United States District Judge.

Dated: April 28, 1941.

In the United States Circuit Court of Appeals for the Third Circuit

OCTOBER TERM, 1941. No. 7733

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

A. B. KIRSCHBAUM COMPANY, A PENNSYLVANIA CORPORATION, DEFENDANT-APPELLANT

APPENDIX TO PLAINTIFF-APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INDEX

	Page
Further testimony of—	
William Mentzel, direct examination (Tr. pp. 35–37, 43–44)	1
McKinley Edwards, direct examination (Tr. pp. 110–111, 113–114)	2
Charles Moetsch, direct examination (Tr. pp. 123–125)	3
Admissions by Defendant (Tr. pp. 148, 181–182)	4
Testimony of—	
Peter Wall, direct examination (Tr. pp. 281–286, 289, 291–293)	4
Louis Nelson, direct examination (Tr pp. 296–300)	10
Arthur J. Nebel, direct examination (Tr. pp. 300–303, 309–311, 312–315)	12
Edward C. Maguire, direct examination (Tr. pp. 317–319)	17

413914—41——1

In the District Court of the United States for the Eastern District of Pennsylvania

CIVIL ACTION FILE No. 798

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

A. B. KIRSCHBAUM COMPANY, A PENNSYLVANIA CORPORATION, DEFENDANT-APPELLANT

Further testimony

WILLIAM MENTZEL, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

(Tr. pp. 35–37.)

* * * * *

Q. And before you got your license as an engineer what did you do for A. B. Kirschbaum Company?

* * * * *

A. I used to be electrician and machine fixer, steam machine fixer, and repair the dressing rooms, or toilets, and everything like that, do like all-around——

The COURT. I suppose the idea is to show that Kirschbaum is in some kind of a business, to wit, the operation of a building, and this may have some bearing on it. I don't know whether it has or not. However, go ahead.

By Mr. BRODIE:

Q. And what were those machines which you took care of?

A. Steam pressing machines——

Mr. MASON. Wait a moment, now——

A. For pressing clothing——

* * * * *

(Tr. pp. 43-44.)

Q. Do you know how long those boilers have been in the building?

A. Well, there was the old ones, they took them out about nine years ago, and we had two new boilers put in, 188 horsepower, that is the Coatesville, and the old one we had in about twelve years, 125 horsepower.

Q. Do you know whether or not these boilers which you take care of, and the pumps which you have described, perform the same functions now as they did when A. B. Kirschbaum Company was manufacturing in this building?

Mr. MASON. That is subject to my objection.

A. Absolutely; and a little more.

By the COURT:

Q. What was the answer?

A. Little more, I think there is more machines upstairs in the building than when Kirschbaum had it, Your Honor.

Q. Same kind of machines?

A. Same kind of machines, steam machines.

* * * * * * *

McKINLEY EDWARDS, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

* * * * * * *

(Tr. pp. 110-111.)

Q. Were you employed as a fireman when A. B. Kirschbaum operated the clothing factory?

A. Yes; I was fireman, but when I went there I wasn't employed as a fireman. I was a coal passer when I first went there.

Q. And during the time that A. B. Kirschbaum operated a clothing factory in this building were you employed there as a fireman?

A. Yes; I was firing then.

Q. What did you do?

A. I fired boilers to make steam and run those pressing machines and the dynamo.

Q. Yes; anything else?

A. Well, that is all the steam done. That is all I did at that time.

Q. Did you have anything to do with the engines?

A. Oh, not then, I didn't.

Q. Did you have anything to do with the pumps?

A. Well, when the engineer used to fix them at that time, if he didn't have no help I used to give him a hand.

Q. And has there been any substantial change in the nature of your work——

A. Oh, yes.

Q. Since Kirschbaum stopped operating——

A. Oh, yes.

Q. The clothing factory?

A. Yes.

* * * * * *

(Tr. pp. 113–114.)

A. There is two, as far as I know.

Q. When A. B. Kirschbaum Company manufactured clothing in this building did they use steam for the same purposes; do you know?

A. Yes.

* * * * * *

Q. Do you know whether steam generally was furnished for the same—was generated for the same purposes when A. B. Kirschbaum operated a clothing factory?

A. Yes.

* * * * * *

CHARLES MOETSCH, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

* * * * * *

(Tr. pp. 123–125.)

Q. At the time A. B. Kirschbaum was manufacturing in the building was any portion of the building rented to any tenant?

A. Yes.

Q. To what tenant?

A. That was the half of the second floor, was rented between '26 and '28—1926 and 1928.

Q. And was there any difference in the work done by the employees as you have described when half of the second floor was rented to a tenant?

* * * * * *

A. No; we had nothing to do with the tenant.

By Mr. BRODIE:

Q. Yes; has there been any difference in the kind of work done by the elevator operators, the firemen, the watchmen and others, since A. B. Kirschbaum stopped manufacturing in the building?

A. No.

* * * * * *

Admissions by defendant

(Tr. p. 148.)

The COURT. That, I believe, will be admitted. Isn't it? Is it admitted that the premises are leased to this concern for manufacturing purposes?

Mr. MASON. Oh, certainly.

* * * * * * *

(Tr. pp. 181–182.)

The COURT. I so take it. I so understand—now, counsel for the defendant will correct me—that if I find that the Act applies to any of these employees, then an injunction shall issue, and on that basis, on the basis of that understanding of the Court, I will sustain the objection and accept this admission by the defendant as evidence of the noncompliance.

Mr. MASON. Your Honor correctly interprets exactly what the stipulation says, and what was intended.

* * * * * * *

The COURT. All right; that is all right.

* * * * * *

Testimony

(Tr. pp. 281–286.)

PETER WALL, having been duly sworn, was examined and testified as follows:

5

Direct examination by Mr. BRODIE:

Q. Where do you live, Mr. Wall?

A. Laurelton, Long Island.

Q. You are here under subpoena?

A. I am.

Q. What is your business?

A. Doing labor relations and arbitration work.

Q. With what company or organization are you connected?

A. The Popular Price Dress Manufacturers Association.

Q. What is the Popular Price Dress Manufacturers Association?

A. An association of approximately two hundred and fifty manufacturers.

Q. Where?

A. In New York City.

Q. Approximately what volume of the, or, approximately what percentage of the entire volume of dresses manufactured in the New York metropolitan area is manufactured by the members of your trade association?

Mr. MASON. May I ask Mr. Brodie—I don't want to interrupt, I just would like to know whether you are talking about men's or women's dresses,

Mr. BRODIE. Women's.

Mr. MASON. Women's.

A. We represent in excess of one hundred million dollars' worth of business, which amounts to, roughly, a third of the dress business itself.

By Mr. BRODIE:

Q. And in the price range in which your manufacturers, your members, do business, what percentage of the total volume manufactured does the amount they manufacture consist of?

A. The question is not clear.

Q. In a particular price range which the members of your association cover, what percentage of the total volume sold in that price range do they manufacture?

A. About eighty-five percent.

Q. Are you familiar, Mr. Wall, with the strike of the building maintenance employees in New York in February 1939?

A. I am.

Q. Do you know when that strike took place?

A. In the first three days of February, in 1939.

Q. Do you know what was the cause of the strike?

A. In general, the wages and hours.

Q. What do you mean, a dispute over wages and hours?

A. Yes; they demanded an increase in wages and a decrease in hours.

Q. Who?

Mr. MASON. Now, just a moment——

A. The maintenance workers.

Mr. MASON. Now, is Mr. Wall—of course, I am going to make a motion in a little while, and I don't want to do it unnecessarily, but is he talking about the general information that anybody has gotten from reading the published and Mr. Thurman Arnold's statement concerning that situation, or is he talking about some personal contact with that strike, do you know? Will you develop that, please?

Mr. BRODIE. Yes.

By Mr. BRODIE:

Q. Where are the plants of the manufacturers which your association represents located?

A. They are located roughly in the area between 35th Street on the south, 40th Street on the north, Ninth Avenue on the west, and Fifth Avenue on the east.

By Mr. MASON:

Q. That is, New York City?

A. New York City.

By Mr. BRODIE:

Q. During the strike what, if any, personal contact did you have with manufacturers or landlords or representatives of unions upon which to base your statement that the strike arose out of a dispute over wages and hours?

A. We received, oh, hundreds of calls from our members demanding that we do something, so it became our duty to

find out the cause of the strike and the effect it had upon our membership, and what we as an association on behalf of those members could do, and our inquiries led us to discover the cause of the strike and the difficulties that beset our members as a result of the strike.

Q. What effect did the strike have upon the operations of the members of your trade association?

Mr. MASON. That is objected to, sir, as obviously no foundation to be offered in this case——

The COURT. Oh, I am going to take it subject to the objection. I will note your objection and take the testimony subject to it, and consider it all on a motion to strike out.

Mr. MASON. Well, I suppose there is no use of my arguing about its total irrelevancy and I don't think it will be necessary to make much of an argument eventually.

The COURT. Well, I doubt if it could be very lengthy.

Mr. BRODIE. Go ahead.

A. In view of the fact that the buildings run from about twelve stories up to forty-eight stories high, it completely disrupted the shops, the buying offices, and even mail delivery, so that business had to be stopped in those buildings, and in many instances, where it was possible for the manufacturer to get to his floor, he took some of those samples, because it was immediately preceding Easter that the strike took place, and took them to various hotels, if possible, got in touch with the buyers to get them over there.

By Mr. BRODIE:

Q. Do you know whether buyers were able to visit manufacturers?

A. They were unable to visit manufacturers during the strike.

Q. Do you know what effect it had upon shipments of incoming goods to the members of your trade association?

A. The trucks in that vicinity were so crowded, standing in the streets, with merchandise in the trucks, because of their inability to deliver to the consignees, that it became a very serious traffic menace over there, and no deliveries of any kind were made, going in or going out.

Q. Now, how about outgoing shipments, to what extent were they interfered with by this strike?

A. Practically one hundred percent at a standstill.

Q. Do you know what percentage of the total output of the members of your trade association is shipped outside of New York to other States?

* * * * *

(Tr. p. 289.)

A. Between eighty-five and ninety percent is in interstate commerce.

By Mr. BRODIE:

Q. Mr. Wall, do you know the number of workers employed by the members of your trade association which were affected by the strike?

A. We have a total number of union workers—I am not in a position to give you the workers outside of the union workers—that would probably exceed forty thousand.

* * * * *

(Tr. pp. 291–293.)

By Mr. BRODIE:

Q. Do you know, Mr. Wall, whether the effects of this strike extended beyond the particular dress industry in which you are interested, that is, if its effects extended beyond the manufacturers' plants in New York?

A. Yes; it did have an effect outside of New York State.

Q. Did it affect production employees outside of New York State?

A. It did.

Q. How?

A. As follows: Many of our manufacturers have inside shops, which are owned by the manufacturers or contractors outside of the State of New York, Pennsylvania as well as Connecticut, and as far south as Maryland, Massachusetts, and several other States, and because of the stoppage of the maintenance service in the buildings, no goods could come out of there to be shipped to these contracting shops, and no goods from the contract shops could be delivered to the place of delivery in New York.

Q. Do you know, Mr. Wall, whether buyers who normally buy in the New York market, or who had by overtures indicated an intention to buy in the New York market went to other markets?

A. Yes; they made statements to the effect that they came to New York City, because of the Easter, approaching Easter, and they needed merchandise, and if they couldn't get it in New York they would go to some other source, perhaps St. Louis or Chicago.

By the COURT:

Q. It is what happens in every strike, isn't it?

A. Not necessarily.

Q. Well——

A. It may not interfere with interstate commerce in every strike.

Q. Oh, I understand, but any strike that ties up production, all these results you are talking about will happen, won't they? Buyers will go to other places?

A. Well, it didn't directly tie up production, but because of the maintenance employees' strike——

Q. I understand.

A. Production itself was tied up.

Q. That is what I say.

A. Workers couldn't get——

Q. This last effect which you speak of, of buyers going to other places, that would happen if the manufacturers' employees were on strike and the place shut down for that reason, wouldn't it?

A. It is possible.

Q. There isn't any difference in the result, is there? All right.

A. No; except that in many instances wants—the needs of the buyers could not be fulfilled by the outside markets.

Mr. BRODIE. We don't contend that there is any difference in the effect.

(Tr. pp. 296–300.)

LOUIS NELSON, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

Q. Where do you live, Mr. Nelson?

A. 147 Pulaski Street, Brooklyn, New York.

Q. What business are you engaged in?

A. I am managing a trade-union, Local No. 155, International Ladies' Garment Workers Union.

Q. And what branch of the garment workers does that union include?

A. Knitted outerwear.

Q. How long have you been engaged in union work?

A. Over thirty years.

Q. Are you familiar with the strike in February of 1939 of the building employees in New York?

A. I am.

Q. What contact did you have with that strike?

A. Members of our union stopped work with employers and called up the office informing us——

Mr. MASON. Speak a little louder. I can't hear at all what you are saying.

A. (Continued.) Members of our union who are employed in those buildings in knitted outerwear called our office of the union informing us that they couldn't go up to work, for several reasons, one, that the elevators aren't running, second, they have no live steam to steam the cloth, and to press the ready-made garments in the knitted outerwear industry.

By Mr. BRODIE:

Q. Do you know how many knit goods mills in New York were affected?

A. Approximately, about thirty-five.

Q. Do you know what effect the strike had upon the knit goods mills?

A. Many of our members lost——

By Mr. BRODIE:

Q. No; I am talking now about the mills, not so much——

A. About cancellations in the industry?

Q. Yes; cancellations of orders.

A. That is right.

Q. What other effect—were they able to get any raw materials?

A. No; they couldn't.

Q. Were the shops heated during the strike?

A. Oh, no.

Q. During the production of knit goods is there or is there not a constant flow of goods in and out, goods going out to be processed, and then coming back for more work on them, and then going out again for more processing, is that or is that not a characteristic of the industry?

A. Some of them have to go through the different stages three times in the process of manufacturing the garment.

Q. Now, could that flow in and out take place during the strike of the building employees?

A. Oh, no.

Q. In your union, Mr. Nelson, about how many employees were directly affected by the strike?

A. Between nine hundred and a thousand.

Q. And in what way were they affected? Did they lose any time from their work?

A. While the strike was on?

Q. Yes.

A. They couldn't work.

Q. Did they lose any time from their work later?

A. That is right.

Q. Why?

A. Cancellation of orders.

Q. Do you know, Mr. Nelson, whether these thirty-five knit goods mills to which you refer ship their finished products outside the State of New York?

A. New York ships between eighty and ninety percent outside of New York.

Mr. BRODIE. That is all.

ARTHUR J. NEBEL, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

(Tr. pps. 300–303.)

Q. Where do you live, Mr. Nebel?

A. 719 Drake Avenue, Roselle, New Jersey.

Q. By whom are you employed?

A. Railway Express Agency.

Q. In what capacity?

A. Vehicle supervisor.

Q. In what district or division?

A. Division 3.

Q. Where?

A. The garment area.

Q. Of what city?

A. New York City, pardon.

Q. Are you familiar with the strike of building maintenance employees in February of 1939?

A. Yes.

Q. Just going back to your work a moment, what area is included in Division 3 over which you are supervisor?

A. 28th Street to 38th Street.

Q. And what area was affected by the strike of the building service employees, or in what area did the building service employees go out on strike?

A. Well, for my own territory, that is, speaking of 28th Street to 38th Street——

Q. Yes, sir.

A. Is practically the entire territory.

Q. And what business does the Railway Express Agency do for the manufacturers in that territory?

A. We accept shipments from them to the various parts of the United States, and vice versa, that is, accept shipments all over the United States to these people in the garment area.

Q. Approximately what percentage of the shipments that are made through your facilities by these manufacturers go out of the State of New York?

A. Ninety percent.

Q. And approximately what percentage of the deliveries made by your company to these manufacturers come from points outside the State of New York?

A. Same ratio.

Q. In your business do you generally pick up at street level or do you pick up at the consignor's premises?

A. Consignor's premises.

Q. And when you make deliveries, do you deliver to the consignee's office or shop, or do you deliver to street level?

A. To the office or shop.

Q. During the strike, which lasted according to the testimony before the Court February 1st, 2nd, and 3rd, 1939, were your employees able to pick up and deliver as they did theretofore and as they were when the strike was finished?

A. No; they were not.

Q. Do you keep, or are there kept under your supervision records showing the total number of outgoing shipments and the total number of incoming shipments daily?

A. Yes.

Q. Have you those records with you?

A. Yes; I have them here.

Q. Will you please look at those records?

A. Period of February?

Q. Yes. What is that book you have there?

A. We term it the three-year records, for comparison of costs——

By Mr. MASON:

Q. It is what?

A. A three-year record, we refer to it as a three-year record, for comparison of cost of shipment.

By Mr. BRODIE:

Q. Now, going back to January 25, 1939, will you state the number of outbound shipments that your company handled from the area in which the employees went out on strike about a week later?

(Tr. pp. 309–315.)

By Mr. BRODIE:

Q. Will you answer the question? Go ahead, Mr. Nebel.
A. 17,246 shipments.
Q. And January 26?
A. 18,518.
Q. January 27th?
A. 18,515.
Q. January 28?
A. 15,365.
Q. January 30?
A. 13,038.
Q. 31st?
A. 18,007.
Q. February 1st?
A. 12,675.
Q. Was that the first day of the strike?
A. Yes, sir.
Q. What day of the week was that? Well, I will——
A. I will tell you; I can tell from my records.
Q. All right.
A. Wednesday.
Q. And January 25th was the Wednesday before?
A. Right.
Q. All right. Now, what was your figure for February 1?
A. 12,675.
Q. February 2nd?
A. 14,729.
Q. And February 3rd?
A. 13,785.
Q. That was the last day of the strike?
A. Yes, sir.
Q. How about the 4th; what was that?
A. That was Saturday; 17,731.
Q. How about the 6th?
A. 15,882.
Q. And the 7th?
A. 19,053.

Q. And the 8th?

A. 20,633.

Q. The 9th?

A. 22,751.

Q. And the 10th?

A. 21,874.

Q. Does that book also contain a record of the in-bound shipments?

A. Yes.

Q. Now, before we go to the in-bound shipments I want to make sure that I understand your testimony to be that at least ninety percent of those out-bound shipments are for points outside the State of New York.

A. Yes.

* * * * * *

By Mr. BRODIE:

Q. Mr. Nebel, are you familiar with the extent to which the buildings in the area under your supervision were affected by the strike?

A. Most entirely; I would say probably eighty-five, ninety percent of the buildings were affected in that area.

Q. All right; now, let's go to the in-bound shipments. Turn to January 25th.

* * * * * *

By Mr. BRODIE:

Q. These records of in-bound shipments are made in the same way as the out-bound?

A. Yes.

Q. All right; will you please tell the Court how many in-bound shipments came in or were delivered by you on January 25th, 1939?

A. 4,837.

Q. And on the 26th?

A. 5,600.

Q. On 27th?

A. 5,158.

Q. On the 28th?

A. 4,531.

Q. On the 30th?
A. 7,579.
Q. On the 31st?
A. 5,382.
Q. On the 1st of February?
A. 3,503.
Q. On the 2nd of February?
A. 3,751.
Q. On the 3rd of February?
A. 3,559.
Q. On the 4th?
A. 7,988.
Q. On the sixth?
A. 10,602.
Q. On the 7th?
A. 6,132.
Q. On the 8th?
A. 4,608.
Q. On the 9th?
A. 5,194.
Q. And on the 10th?
A. 5,540.

Q. During this period, Mr. Nebel, during the period covered by the strike, namely, February 1st, 2nd, and 3rd, 1939, did you receive from points outside the State of New York incoming shipments to consignees which you were unable to deliver?

A. Yes.

Q. What did you do with those goods?

A. We would have to carry them over until the following day.

Q. Is it your experience, Mr. Nebel, that any particular day of the week has a fewer number of shipments, under normal circumstances, than other days?

A. Yes.

Q. Outgoing?

A. Yes.

Q. What day of the week is that?

A. Monday is the lightest, and Tuesday is next.

Q. Do you know what relationship this strike had, and the period during which it occurred had to the Easter season in the garment trade?

Mr. MASON. Well, what was the date that Easter came? You know that, Mr. Brodie, I suppose.

Mr. BRODIE. April 9th.

Mr. MASON. Ask him if he knows when Easter came?

By Mr. BRODIE:

Q. Well, do you know when the Easter season began for the garment industry?

A. You are talking about the Easter season?

Q. In 1939.

A. The Easter?

Q. Sir?

A. Talking about the Easter season?

Q. I am talking about the Easter Season.

A. The season would start——

Q. In the dress industry.

A. In 1939 it really started the end of January.

Q. And normally would your out-bound shipments increase daily during that Easter season?

A. Yes.

* * * * * *

(Tr. pp. 317–319.)

EDWARD C. MAGUIRE, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

Q. Where do you live, Mr. Maguire?

A. 129 East 82nd Street, New York City.

Q. What is your business or profession?

A. I am an attorney at law.

Q. Are you counsel for the Building Service Employees Union in New York?

A. Local 32B.

Q. Are you familiar with the strike of building maintenance employees in 1939 in New York?

A. I am, sir.

Q. Was the local which you represent out on strike, the members of that local?

A. Certain members of it.

Q. Do you know the cause of that strike?

A. Yes, sir.

Q. What was it?

A. A requirement or a demand for increased wages, lowering of hours, and some other minor conditions.

Q. Do you know the number of building employees out on strike during the first three days of February 1939?

A. I do, sir.

Mr. MASON. That is objected to, of course, sir, and all this line.

The COURT. All right; I will take it all subject——

Mr. MASON. Taken subject to my objection.

The WITNESS. I do, sir.

By Mr. BRODIE:

Q. And how many were out on strike?

A. Approximately five thousand five hundred.

Q. Do you know what area was covered by the strike?

A. Yes, sir.

Q. Will you please bound for the Court, by streets, the area in which the buildings were located from which the employees went out on strike?

A. Generally, from 14th Street on the south to 41st Street on the north, the North River to Fifth Avenue, with a fewer number of buildings out towards the lower end. The buildings, the commercial buildings, are more concentrated from approximately 23rd Street up.

Q. Do you know, Mr. Maguire, whether in that area any manufacturing is done?

A. Yes, sir.

Q. Is there?

A. There is.

Q. What is the principal product of that area?

A. Garments.

Q. Have you any idea of the number of garment firms doing business in that area?

A. I do not know the number, sir.

Mr. BRODIE. No further questions.

U. S. GOVERNMENT PRINTING OFFICE: 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7733

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee,

vs.

A. B. KIRSCHBAUM COMPANY, Appellant,

And afterwards, to wit, the 8th day of October, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of December, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 7733. October Term, 1941

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor

v.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation,

Appellant.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION

(Filed December 17, 1941)

Before MARIS, JONES and GOODRICH, *Circuit Judges.*

MARIS, *Circuit Judge.*

This is an appeal by the defendant from a judgment of the District Court for the Eastern District of Pennsylvania, 38 F. Supp. 204, which enjoined it from violating Section 15(a) (2) of the Fair Labor Standards Act of 1938, (29 U.S.C.A. §§ 215(a) (2)).

The defendant is the owner of a six story building which it at one time occupied as a factory for the production of

men's clothing. For the past nine years the defendant has done no manufacturing. It leases space in its building to tenants, a number of whom manufacture goods which are shipped in interstate commerce. The defendant employs, among others not herein involved, three elevator operators, two watchmen, three firemen, an engineer, a carpenter, a carpenter's helper and a porter. The court found that the defendant paid those employees at a rate less than that prescribed in Section 6 of the act and employed them for a number of hours in excess of that prescribed in Section 7 without compensating them at the overtime rate therein prescribed. It concluded that this amounted to a violation of Section 15(a) (2) of the act and granted an injunction in accordance with the power conferred upon it by Section 17 of the act.

The defendant's arguments in support of its appeal fall into two general divisions: First, that the wage and hour provisions of the act do not apply to any employees of employers such as this defendant who are not engaged in interstate commerce or in the production of goods for interstate commerce; and Second, that the defendant's employees are not entitled to the benefit of the wage and hour provisions of the act because they are not themselves engaged in interstate commerce or in the production of goods for interstate commerce and also because they are employees in a service establishment and therefore expressly excluded from the benefits of the act by Section 13(a) (2) thereof.

Few courts have dealt directly with the first point raised by the defendant and in those courts which have recognized it as a distinct problem the decisions have not been uniform. Representative of the cases holding that the application of the act is determined by the character of the employee's work is Hall v. Warren Bradshaw Drilling Co., 40 F. Supp. 272 (N. D. Tex. 1941) and of the cases holding that it is determined by the nature of the employer's business as well as by the character of the employee's work is Killingbeck v. Garment Center Capitol, Inc., 259 App. Div. (N. Y.) 691, 20

N. Y. S. 2d 521 (1940). In our view neither the language used in Sections 6 and 7 nor the legislative history of those sections furnish any support for the position taken by the defendant that the coverage of the act is dependent upon the character of the employer's business. Section 6(a) reads: "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce" wages at a specified rate. Here there is no limitation upon the universality of the class of employers based upon the nature of the employer's business. On the contrary the expression "every employer" is all embracing and includes within its scope employers whose business is not in commerce[1] and who produce nothing for commerce.[2] It is the employee's work which must be in commerce or, in the alternative, in the production of goods for commerce. Equally clear and unambiguous is the language of Section 7(a) which reads: "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce" for a workweek longer than the prescribed number of hours unless he pays the employee at a fixed overtime rate. The phrase "No employer" certainly may not logically be qualified as meaning "no employer who is engaged in commerce or in the production of goods for commerce" which is the construction urged by the defendant. The emphasis in both sections is clearly placed upon the nature of the employee's work.

That the phraseology used was deliberately chosen by Congress and aptly expresses its intention to make coverage dependent upon the work done by the employee and not upon

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1 The word "commerce" as used in the act is defined by Section 3(b) to mean trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. 29 U.S.C.A. § 203(b). It is used in the same sense in this opinion.

2 When Congress intended to exclude from coverage on the basis of the employer's business it did so in express terms in Section 13(a) of the act and did not leave the matter to inference or conjecture.

the nature of the employer's business is indicated by the legislative history of the sections. The wage and hour sections of the bill as it had passed the Senate were amended by the House of Representatives so as to read: "every employer engaged in commerce in any industry affecting commerce shall . . . pay, each employee employed by him . . ." certain wages based upon a fixed minimum and "no employer engaged in commerce in any industry affecting commerce shall employ any of his employees . . ." in excess of certain maximum hours without paying overtime compensation.[3] It will be seen that under this amendment the wage and hour provisions of the act were to apply only if the employer was engaged in commerce in an industry affecting commerce. The Senate refused to accede to these House amendments, however, and a conference between the two houses ensued. The conference committee report which was thereafter adopted by both houses substituted for the prior text of the bill the language now embodied in the act. The statement of the House conferees made to the House of Representatives in explanation of the changes proposed by the conference report said, in this connection:

> "Section 6 of the conference agreement provides for the establishment of minimum wages for employees engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the employer was engaged in commerce in any industry affecting commerce. . . ."
>
> "Section 7 of the conference agreement provides for the establishment of maximum hours of employment for employees engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the employer was engaged in commerce in an industry affecting commerce. . . ."[4]

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3 82 Cong. Record (1938), pp. 7415, 7419.

4 75th Cong., 3d Sess. House Report No. 2738 to accompany S. 2475.

Nothing in Sections 2, 5 and 8 of the act justifies the conclusion that Congress meant other than it said in Sections 6 and 7. Section 2 expresses the policy of the act to be the elimination of substandard labor conditions in industries engaged in commerce or in the production of goods for commerce. Sections 6 and 7 embody the means chosen to accomplish this purpose, specifically, a statutory minimum standard of wages and maximum standard of hours without overtime wages for all those engaged as workers in commerce or in the production of goods for commerce. Sections 5 and 8, on the other hand, embody a device whereby Congress sought to provide through industry committees a flexible means to accelerate the time within which the minimum wage of 40 cents an hour which it deemed desirable could be made effective in whole industries engaged in commerce without causing serious economic dislocation in any such industry. We conclude that it was the intention of Congress to make the act applicable to all those who are employed in commerce or in the production of goods in commerce without regard to the nature of their employer's business and that this intention was given apt expression in Sections 6 and 7 of the act.

The defendant takes the position that if the act is so construed it violates the Tenth Amendment of the Constitution. That amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power to regulate interstate and foreign commerce was delegated to the federal government by Article I, Section 8, clause 3 of the Constitution. The regulation by Congress through the Fair Labor Standards Act of 1938 of the wages and hours of those engaged in interstate commerce or in the production of goods for interstate commerce is a valid exercise of the commerce power. United States v. Darby, 312 U. S. 100. Whether the act seeks to regulate commerce by using a classification based upon the general character of the busi-

ness of the industry by which individuals are employed or by a classification based upon the individual character of the work performed by each employee is a matter of statutory construction: Either is a permissible method of exercising the legislative power delegated to Congress by the commerce clause and accordingly does not encroach upon the powers reserved to the states.

The defendant next insists that, even if the coverage of the act is dependent upon the nature of the work done by each employee, the work of the employees involved in the present case is neither in commerce nor in the production of goods for commerce. It is quite obvious that the defendant's engineer, firemen, elevator operators, watchmen, carpenters and porter were not engaged in the production of goods for commerce in the sense that they had actual physical contact with the goods produced. The word "produced," however, was used in no such restricted sense in the act. It is defined at some length in Section 3(j) (29 U.S.C.A. § 203(j)) with the obvious intention of giving it a broader meaning than the one which it has in ordinary usage. The statutory definition is:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Thus for the purposes of the act an employee is to be deemed engaged in the production of goods for commerce not only when he has direct physical contact with the goods, but also when he is employed in "any process or occupation necessary to the production thereof."

The question before us, therefore, comes down to whether the men with whom we are here concerned were

engaged in an occupation necessary to the production of goods for commerce. We think they were. All the manufacturing tenants in the defendant's building need heat and light; most need elevators to carry men and material up to their respective floors in the building and to take finished product and men down; some need high pressure ("live") steam for pressing and shrinking the materials used by them in the clothing which they manufacture and some need direct electric current without which they cannot operate their machines. It is the work of the engineer and firemen employed by the defendant to produce the heat for the building, the high pressure steam for the pressing and shrinking, the electricity for light and power. It is the work of the elevator operators to carry the materials and finished manufactured product to and from the floors where manufacturing takes place. In each instance the work is so essential to the production of the tenants' goods that if the defendant were not to provide the services the tenants themselves would have had to provide them. The vital necessity to production of the services of elevator operators, engineers and firemen is vividly demonstrated by evidence presented by the plaintiff as to the effects of a strike of building maintenance workers in New York City in 1939. The strike arose out of a dispute concerning wages and hours. It was carried on during the 1st, 2d and 3d days of February and during those three days production of the knitwear and ladies garments manufactured in the building almost came to a standstill. The effect upon shipments in and out of the building was equally drastic. In the case before us the evidence justifies the conclusion that the services of the elevator operators,[5] engineer and firemen were so necessary to the production by the defendant's tenants of goods for commerce as to be indispensable to that production. Although the services of the watchmen, car-

[5] The elevator operators are also directly engaged in commerce, for although their activities take place entirely within the state they carry out one step in the actual transportation of the goods to points outside the state.

penters and porter are not necessary in the sense of being indispensable they are necessary in that they are both convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce.[6]

Finally the defendant contends that its employees are not entitled to the benefits of the wage and hour provisions of the act because they are employed in a service establishment, the employees of which are expressly excluded from the benefits of the act by Section 13(a) (2) thereof. Section 13(a) (2) reads: "The provisions of Sections 6 and 7 shall not apply with respect to . . . any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." It is clear that to come within the exemption not only must the employees render service the greater part of which is in intrastate commerce but they must also be engaged in a "service establishment." The district court found that the employees here involved were not within the exemption because their employer did not operate a "service establishment" within the meaning of the act. We agree with the district court that the defendant's business is not a service establishment.[7] It may be conceded that the defendant's employees render service to the tenants but this service is merely incidental to the business of the defendant which is that of leasing space in its building rather than of selling service. The rendering of some service is incidental to most businesses but they are not thereby necessarily stamped as "service establishments." That term may not be given so broad a

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[6] "Necessary" has frequently been construed to mean "convenient" or "appropriate." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413; Legal Tender Case, 110 U.S. 421, 440; Meriwether v. Board of Directors, 165 F. 317, 319 (C.C.A. 8, 1908); Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co., 87 N. E. 670, 671, 115 Iowa 734; Brooks v. Chicago, W. & V. Coal Co., 84 N.E. 1028, 1031, 234 Ill. 372; Hutcheson v. Atherton, 99 P. 2d 462, 467, 44 N. M. 144.

[7] In direct conflict with this conclusion and upon substantially identical facts is the ruling in Fleming v. Arsenal Bldg. Corporation, 38 F. Supp. 207 (S.D.N.Y. 1941). An excellent note upon this case appears in 41 Columbia Law Review 1260.

meaning since it represents a special exception to the general coverage of the act. Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52 (C. C. A. 8, 1940).

Had Congress intended the term "service establishments" to include all establishments rendering incidental service it would not have considered it necessary to make specific exemptions in the case of carriers by air, carriers by railway, trolley or motor bus, and telephone exchanges; each of which classes of establishment undoubtedly renders incidental services. Examples of other similar establishments will readily come to mind. It is true that there may be merely a difference in degree between establishments primarily engaged in rendering service—which the act designates as "service establishments"—and those in which the rendering of service is incidental to some other activity. The line between the two types of business may in some cases be difficult to draw. We do not here attempt to draw it but merely decide that the defendant's business is not on the "service establishment" side of the line. In reaching our conclusion we have given weight to the fact that the exemption as to service establishments was added by the conference report to the exemption as to retail establishments already contained in subparagraph (2) of Section 13(a) of the bill. From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activitity of which is to furnish service to the consuming public. Typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops. In Wood v. Central Sand & Gravel Co., 33 F. Supp. 40, 47 (W.D. Tenn. 1940), the court suggested as illustrations of what Congress meant by service establishments "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops."

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8 Exempted by Section 13(a) (4), (9) and (11).

We think these illustrations apt. They embrace a class of establishments wholly different from that of the defendant. The conclusion to which we have come makes it unnecessary for us to decide whether the greater part of the service activities of the employees here involved is in intrastate commerce.

We conclude that the employees of the defendant to whom we have referred are entitled to the benefit of the wage and hour provisions of the act and that the defendant was properly enjoined from further violations thereof.

The judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7733

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee,

vs.

A. B. KIRSCHBAUM COMPANY, Appellant

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Albert B. Maris, Circuit Judge.

December 17, 1941.

Endorsements: Order Affirming Judgment. Received & Filed Dec. 17, 1941. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellant and Appellee, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee, vs. A. B. Kirschbaum Company, Appellant, No. 7733, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of January in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-sixth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. .

A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation,
Petitioner,

v.

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
THE STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
SPECIFICATION OF ERRORS TO BE URGED	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	23
APPENDIX	25
Text of the Fair Labor Standards Act	25
Opinion in Fleming *v.* Arsenal Building Corp., C. C. A. 2nd, December 30, 1941	46
Opinion in Cecil, *et al*, *v.* Gradison, *et al.*, Ct. App. Ohio, 1st Dist., Nov. 17, 1941	53
Opinion in Robinson *v.* Massachusetts Mutual Life Insurance Co., Supreme Ct. Tenn., Nov. 29, 1941	58

CITATIONS.

CASES:

Baggett *v.* Henry Fischer Packing Co., 37 F. Supp. 670 16

Cecil, *et al*, *v.* Gradison, *et al*, Ct. App. Ohio, 1st Dist., Nov. 17, 1941 ..... 13, 16, 18, 22

Farr *v.* Smith Detective Agency and Nightwatch Service, Inc., 38 F. Supp. 105 16

Fleming *v.* A. B. Kirschbaum Co., C. C. A. 2nd, Dec. 17, 1941 ..... 9, 18, 21

Fleming *v.* Arsenal Building Corporation, D. C. S. D. N. Y., 38 F. Supp. 207 ..... 19, 22

Fleming *v.* Arsenal Building Corporation, C. C. A. 2nd, Dec. 30, 1941 ..... 6, 7, 8, 9, 17, 18, 21

Gerdert *v.* Certified Poultry and Egg Co., 38 F. Supp. 964 16

Hall *v.* Warren Bradshaw Drilling Co., 40 F. Supp. 272 ..... 1[illegible]

Jewel Tea Co. *v.* Williams, 118 F. 2nd, 202 ..... 2[illegible]

Killingbeck and Riddoch *v.* Garment Center Capital, Inc., 20 N. Y. Supp. (2nd) 521, 259 App. Div. 691 ..... 12, 16

PAGE

Merryfield, *et al*, *v.* F. M. Hoyt Shoe Corp., *et al*, 41 F. Supp. 794 . . 11, 16, 21

Pederson *v.* J. F. Fitzgerald Construction Co., 262 N. Y. App. Div. 665 . . 16

Robinson *v.* Massachusetts Mutual Life Insurance Co., Tenn. Supreme Ct., Nov. 29, 1941 . . 14, 16, 22

Sunshine Mining Co. *v.* Carver, 34 F. Supp. 274 . . 17

U. S. *v.* F. W. Darby Lumber Co., 312 U. S. 100 . . 7

STATUTES:

Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 U. S. C. A., Sec. 201, *et seq.*) . . 25

Sec. 3(j) . . 8, 9, 20

Sec. 13(a) (2) . . 3, 6, 8, 9

Sec. 16(b) . . 11

Judicial Code, Sec. 240(a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 . . 2

OTHER SOURCES:

83 Congressional Record, 75th Cong. 3rd Sess.,

p. 9168 . . 17

p. 9260 . . 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. 1

A. B. Kirschbaum Company, a Pennsylvania corporation,

Petitioner,

v.

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, A. B. Kirschbaum Company, a Pennsylvania corporation, respectfully prays this Court for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, to review a final judgment of that Court entered on December 17, 1941, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania entered on April 28, 1941.

OPINIONS BELOW.

The opinion of the District Court (R., pp. 175-180), is reported in 38 F. Supp. 204. The opinion of the Circuit Court of Appeals (R., pp. 213-23), has not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals, which Petitioner seeks to have reviewed, was filed December 17, 1941 (R., p. 213).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

THE STATUTE INVOLVED.

The statute involved, known as the Fair Labor Standards Act, (hereinafter called the "Act") approved June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Sec. 201 *et seq.*, is printed in the Appendix, *infra*, pages 25-45.

QUESTIONS PRESENTED.

The questions are:

1. Whether the Act extends to employees of an employer who is neither engaged in interstate commerce nor in the production of goods for such commerce?

2. Whether the building service employees of the owner of a loft building whose only business is the rental, operation, and maintenance of such building, are engaged in interstate commerce or in the production of goods therefor within the meaning of the Act merely because some of

the tenants in such building are engaged in the production of goods for interstate commerce?

3. Whether the elevator operators of the owner of such a loft building are directly engaged in interstate commerce?

4. Whether such building service employees are exempt from the wage and hour provisions of the Act by Section 13 (a)(2) thereof, which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce?

5. Whether the Act would contravene the Tenth Amendment to the Constitution of the United States if held to be applicable to such employees?

STATEMENT.

The Petitioner, A. B. Kirschbaum Company, owns a six-story loft building in Philadelphia (R., pp. 3, 175). Its sole activity is to operate the building as a landlord, leasing space therein to any person desiring it (R., p. 166). Although certain of its tenants are engaged in the production of goods for interstate commerce, Petitioner does no manufacturing whatsoever (R., p. 21), and has no interest in the manufacturing or other activities of any of its tenants (R., pp. 166-167, 175). In fact the Petitioner has no business or source of revenue other than that which is connected with its ownership and leasing of its building (R., p. 176).

In operating the building, it employs a staff of building service employees consisting of three elevator operators, two watchmen, three firemen, one engineer, a carpenter and a carpenter's helper, and a porter or cleaner (R., p. 175), who are the employees involved in the present case.

The Petitioner through its aforesaid employees, heats the building, keeps it in repair, furnishes steam and direct electric current to those of its tenants who desire it,

cleans those portions of the building which are not leased, and provides means of ingress and egress for its tenants, their employees and property being shipped to and by them. None of the foregoing employees produces, manufactures, handles, processes, or in any other manner works on or touches for the purpose of production any goods produced by any of the tenants. The goods transported in the elevators operated by certain of said employees are always in the custody of the representatives of the tenants, or their employees, or of employees of persons whom the tenants have engaged to transport the goods, or of the employees of carriers from whom they are receiving goods (R., pp. 37, 47, 56, 57, 83, 85, 99, 100, 109, 110, 113, 120, 121, 129, 135, 138, 149, 158, 159, 163).

The Respondent, contending that all of the foregoing building service employees of the Petitioner are covered by the Act, filed its complaint on March 14, 1940, and thereafter on April 19, 1940, filed its amended complaint (R., pp. 3-7), alleging that the Petitioner had violated the Act in that it had not paid its employees the minimum wages provided for in Section 6, and had worked them in excess of the hours provided in Section 7 without the payment of overtime as therein provided, and prayed for an injunction restraining future violations. The basis of the Respondent's contention was that since the Petitioner's employees were engaged in the servicing and maintenance of a building, space in which was rented to persons engaged in the production of goods for interstate commerce, such employees were themselves engaged in the production of goods for interstate commerce and thus covered by the Act in view of the provisions of Section (3) (j) which provides that an employee shall be deemed to have engaged in the production of goods for interstate commerce if he was employed "in any process or occupation necessary to the production thereof." In addition the Respondent asserted that the

Petitioner's elevator operators were also directly engaged in interstate commerce.

On April 26, 1940, the Petitioner filed its Answer wherein it admitted that it did not conform to the requirements of Sections 6 and 7 of the Act with respect to certain of its aforesaid employees (Answer, pars. VII, VIII, R., p. 12), but asserted *inter alia*, first, that its employees did not come within the provisions of the Act; second, that in any event they were specifically exempt under the provisions of Section 13 thereof; and third, that the Act could not constitutionally be applied to them (R., pp. 13, 14).

After trial, the District Court, in an opinion by Kirkpatrick, *J.*, filed April 2, 1941, granted judgment for the Respondent (R., pp. 175-180), which judgment was entered on April 28, 1941 (R., pp. 180-182).

On the same day the Petitioner filed its notice of appeal to the Circuit Court of Appeals for the Third Circuit, together with bond for costs sur appeal. At the same time the District Court, on motion of the Petitioner, entered its order suspending the injunction pending appeal (R., p. 185).

After argument on appeal, the Circuit Court, in an opinion filed December 17, 1941, affirmed the judgment of the District Court (R., pp. 213-23).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Third Circuit erred—

(1) In holding that the Act covers employees of an employer who is neither engaged in interstate commerce nor in the production of goods for such commerce.

(2) In holding that the building service employees of the Petitioner are engaged in the production of goods for interstate commerce within the meaning of the Act.

(3) In holding that the elevator operators in the loft building of the Petitioner are directly engaged in interstate commerce.

(4) In holding that the building service employees of the Petitioner are not exempt from the wage and hour provisions of the Act by Section 13 (a)(2) which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce.

(5) In holding that the Act, when applied to the building service employees of the Petitioner, does not violate the Tenth Amendment to the Constitution of the United States.

(6) In holding that the building service employees of the Petitioner are covered by the Act and in affirming the judgment of the District Court enjoining the Petitioner from violations of the Act.

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant the writ requested is invoked because the Circuit Court of Appeals for the Third Circuit:

I. Has decided important questions of federal law which have not been, but should be, settled by this Court.

II. Has, in its interpretation of important provisions of the Act, gone beyond the decision of the Circuit Court of Appeals for the Second Circuit in a case involving similar facts.[1]

III. Has decided important questions of federal law in conflict with applicable decisions of state and lower federal courts.

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[1] *Philip B. Fleming* v. *Arsenal Building Corporation, et al.*, decided By the United States Circuit Court of Appeals for the Second Circuit on December 30, 1941, not yet reported. The decision however is printed in full in the Appendix to this Petition, pp. 46-53, *infra*.

I.

The case of *Fleming v. Arsenal Building Corporation, et al, supra,* decided by the Circuit Court of Appeals for the Second Circuit, involved (on facts substantially the same as those herein), the same legal questions as are involved in the present case and that Court likewise entered judgment sustaining the Act as applicable. However, after referring to the wide conflict of opinion among *appellate* courts by stating that "So far the score is four to one against the view we take," the Second Circuit in the concluding sentence of its opinion stated: "Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling."

That the existing uncertainty with respect to an important and far reaching Act of Congress should be set at rest is not only desirable but essential to the proper administration of the Act and as a guide to those seeking to comply with its provisions.

The only decision of this Court involving the general coverage of the Act is that of *United States* v. *F. W. Darby Lumber Company,* 312 U. S. 100, 85 L. Ed. p. 609 (1941). In that case this Court held the Act constitutional when applied to an employer, engaged in the manufacture and shipment of goods in interstate commerce, with respect to those of his employees who work on or produce the goods which he so ships or expects to ship across state lines. This Court did not attempt to define the precise limits of what particular acts constitute "production for commerce," nor did it of course pass upon those additional questions raised in the present case which were not involved in the *Darby* case as, for example:

(*a*) Whether the Act applies to employees of an employer, such as the Petitioner, who is neither engaged in interstate commerce nor in the production of goods therefor;

(*b*) Whether the phrase "any process or occupation necessary to the production" of goods as used in

"Section 3 (j) of the Act (which section defines the word "produced"), covers activities, such as those of the Petitioner's building service employees, which do not function in the production of goods for commerce, and if so, whether the Act is constitutional;

(c) What constitutes a "service establishment" as that phrase is used in Section 13 (a)(2) of the Act which provides that "The provisions of Sections 6 and 7 shall not apply with respect to * * * any employee engaged in any * * * service establishment the greater part of whose * * * servicing is in intrastate commerce * * *"; and

(d) Whether elevator operators in a loft building space in which is leased to tenants engaged in the production of goods for interstate commerce, are directly engaged in interstate commerce.

With respect to those questions, all of which are raised in the present case, the courts are either uncertain or are in conflict. Thus an authoritative ruling by this Court on those questions is necessary to resolve the conflict and dispel the uncertainty.

II.

Although the Circuit Court in the present case held the Act applicable to building service employees employed by the owner of a loft building, space in which was leased to tenants engaged in producing goods for interstate commerce (thus reaching a conclusion in accord with that subsequently reached by the Second Circuit),[1] in several matters it went further than the Second Cirucit.[2]

Thus, whereas the Third Circuit held that the Petitioner's elevator operators "are also directly engaged in

[1] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, pp. 46-53, *infra*.

[2] In *Fleming* v. *Arsenal Building Corporation, et al., supra*, the Court stated: "On the other hand the Third Circuit in *Fleming* v. *Kirschbaum Company*, 123 Fed. 2d, , agrees with us and indeed in one or two matters went further than we have found it necessary as yet to go" (Appendix, p. 53, *infra*).

commerce,"[3] the Second Circuit stated that it did not find it necessary to decide that question.[4]

Furthermore, whereas the Third Circuit held that an "occupation *necessary* to the production" of goods within the meaning of Section 3(j) of the Act was one not indispensable but merely convenient and appropriate,[5] the Second Circuit, recognizing the constitutional and other difficulties which would ensue if such an interpretation be carried to its logical conclusion, sidestepped the issue by reasoning that if the service employees had been employed by each of the manufacturer-tenants rather than by the landlord, there would have been no question but that their services were "necessary" to the production of goods within the meaning of the Act, consequently they must come within the Act even though their services are rendered to an employer who is not a manufacturer but merely a landlord.[6]

In addition, whereas the Third Circuit held that an employer leasing space to manufacturers engaged in the production of goods for interstate commerce, did not operate a "service establishment" within the meaning of the exemption contained in Section 13 (a)(2) of the Act,[7] the Second Circuit after reluctantly stating that "*Possibly* it is not a 'service establishment' at all,"[8] failed to pass upon the question and held that even if such an employer were a "service establishment," its servicing would not be in intrastate commerce.

The Second Circuit noted in its opinion that the Third Circuit "indeed in one or two matters went further than we have found it necessary as yet to go." Whatever satisfaction that may have afforded the Second Circuit,

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[3] *Fleming* v. *A. B. Kirschbaum Company* (R., p. 219, footnote).

[4] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, p. 48, *infra*.

[5] *Fleming* v. *A. B. Kirschbaum Company* (R., pp. 219-220). Italics supplied.

[6] See *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, pp. 48-50, *infra*.

[7] *Fleming* v. *A. B. Kirschbaum Company* (R., pp. 220-222).

[8] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, p. 50, *infra*. Italics supplied.

the two decisions, read together, left important questions raised by the litigation in much the same state of uncertainty and confusion as before and furnished little comfort to those seeking to learn what the Act means and how to comply with its provisions. Obviously the nature of activities which constitute "commerce" or "the production of goods for commerce" within the meaning of the Act, and the characteristics of an establishment requisite to constitute it a "service establishment" within the meaning of the Act, are important questions of federal law requiring an authoritative and final determination.

III.

In addition to the decisions of the Second and Third Circuits discussed above, the applicability of the Act to building service employees employed by a landlord who rents space to tenants engaged in interstate commerce or in the production of goods therefor, has been presented before different federal and state courts in four other cases, *all* of which have held contrary to the two above Circuits that the Act does not cover such employees. Thus, on the specific question raised in the present case—*viz.*, the application of the Act to building service employees—the score is four to two against the view of the Third Circuit in the present case.

On the broader question—*viz.*, the applicability of the Act to employees of an employer who is neither engaged in interstate commerce nor in the production of goods therefor—the conflict is even greater, the majority of the cases in which the question has been specifically raised holding that the Act does not cover such employees.

The existence of such a conflict of opinion is in itself sufficient to warrant this Court to review the decision in the present case. But the need for an authoritative decision is even greater because of the jurisdiction given by

the Act itself to state courts over suits by employees to recover the compensation provided for in the Act.[1]

Typical of the view of the majority of the decisions, that the Act does not apply to building service employees of a landlord not engaged in interstate activity, is the decision of the United States District Court for the District of New Hampshire in the case of *Merryfield, et al.*, v. *F. M. Hoyt Shoe Corporation, et al.*, 41 F. Supp. 794 (Nov. 6, 1941). In that case suit was brought by building service employees against the Shoe Corporation and the Reconstruction Finance Corporation as the owners of a loft building in which they had been employed, to recover the compensation to which they claimed they were entitled under the Act. The Shoe Corporation had, like the Petitioner herein, formerly been engaged in manufacturing. In 1936 it ceased its manufacturing. Thereafter it rented its factory buildings to other companies, in no way connected with the Shoe Corporation, which engaged in the production of goods for interstate commerce. As owner of the factory buildings it employed the plaintiffs as building service employees. The R.F.C. foreclosed the mortgage which it held and thereafter continued to rent and operate the premises as theretofore.

In dismissing the action, the Court made clear that the interstate activity of the tenants could not bring the employees of the landlord under the scope of the Act. In his opinion Judge Morris stated (pp. 795, 796):

> "The R.F.C. never engaged in the manufacture of any product for interstate shipment. It was merely

[1] See Section 16 (b) of the Act, printed in the Appendix to this Petition, p. 44, *infra*, which provides as follows: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

> the owner and lessor of real estate which was occupied by lessees who were engaged in the manufacture of goods for interstate shipment. The plaintiffs had nothing to do with the actual manufacture of goods but were in the employ of the owners of the real estate, first the Hoyt Shoe Corporation and, second, the R.F.C. They are set out in the complaint as firemen, watchmen and maintenance men to look after the real estate, paid by the Shoe Corporation and later by the R.F.C. * * *
>
> "I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act."

A similar conclusion was reached by the Supreme Court of New York, Appellate Division, in *Killingbeck & Riddoch v. Garment Center Capital, Inc.*, 20 N. Y. Supp. (2d) 521, 259 App. Div. 691 (1940). In that case suit was brought by a watchman and a carpenter formerly employed by the defendant, the operator of a loft building, space in which was leased to tenants engaged in the production of goods for interstate commerce, to recover overtime payments and liquidated damages to which they claimed to be entitled under the Act by reason of the fact that as employees of such building they were performing services necessary to the production by the tenants of goods for interstate commerce. The facts with reference to the activities of the employees in question, the nature of the business conducted by the defendant as well as that conducted by the tenants, and the relation of the employees to the tenants, are substantially the same as those involved in the present case. The Court directed that judgment be rendered for the defendant and in its opinion by Judge Untermyer stated:

"We think the statute does not include such employees *when they are not employees of a manufacturer who is engaged in interstate commerce.* Concededly the statute would include those employees of a manufacturer who produced the goods. * * * *We would encounter insuperable difficulties however, and would distort the statute if we should apply it to employees of others than the manufacturer, having so remote and indirect a relation to the production of the goods as the watchman and the carpenter employed by a landlord a portion of whose premises have, perhaps fortuitously, been rented to tenants engaged in interstate commerce* * * * Such employees are not engaged 'in any process or occupation necessary to the production' of goods destined for interstate commerce but in an occupation which may, perhaps, be necessary in the operation of a building wherein the goods are produced." (Italics supplied.)

To the same effect is the decision of the Court of Appeals for the First Appellate District of Ohio in the case of *Cecil, et al.*, v. *Gradison, et al.*, November 17, 1941.[2] In that case the defendants owned a building in part of which they conducted a banking business. The plaintiffs, one of whom was employed by the defendants to serve as janitor and the other as engineer, and both of whom served as freight and passenger elevator operators, sought to recover from the defendants the overtime compensation to which they claimed they were entitled under the Act. It was alleged by the plaintiffs, and admitted for the purposes of the suit, that they handled shipments of various kinds and descriptions to persons and corporations in other states, which activities were alleged to be in furtherance of the defendants' business and that other-

[2] So far as we have been able to determine the decision has not as yet been officially reported. However a complete copy of the opinion is printed in the Appendix to this Petition, pp. 53-58, *infra*, and it also appears in 4 W. & H. Rep. 698.

wise the packages could not have been transported on the elevators or have passed from the control of the respective tenants to the persons to whom they were directed.

The Court, in affirming the action of the lower court in sustaining a demurrer to the petition, stated:

> "A reading of the declaration of policy contained in Section 202 and the definition of terms makes it clear that Congress meant to protect the interstate transaction from sub-standard labor conditions by regulating such conditions in the interstate transaction and those transactions that directly and substantially affect the interstate transaction. Beyond that, Congress could not go.
>
> "Accordingly, the language of Section 206, 29 U. S. C. A., that 'Every employer shall pay to each of his employees *engaged in* commerce or in the production of goods for *commerce* wages at the following rates' and the provision in Section 207 that 'No employer shall—employ any of his employees who is engaged in commerce or in the production of goods for commerce,' must be limited by the declared purpose in Section 202 and the definition of terms in Section 203, in order to confine the act within the constitutional power of Congress.
>
> "And when so read and limited it is clear that the Act does not apply to employees of intrastate employers engaged to and actually performing intrastate acts, notwithstanding such intrastate acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

The Supreme Court of Tennessee accords with the view of the majority of the decisions. In *Robinson* v. *Massachusetts Mutual Life Insurance Company,* decided by that

Court on November 29, 1941,[3] suit was brought by building service employees against the defendant who was the owner and operator of three office buildings, ninety percent of the space in which was leased to the Tennessee Valley Authority, to recover compensation alleged to be due them under the Act. In affirming the judgment of the lower court in favor of the defendant, the Supreme Court stated:

> "We are of opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce. We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act, it is limited to those employees who contribute directly to the production of goods for interstate commerce." • • •
>
> "Plaintiff in error and those for whom he sues are one step removed from the class of employees embraced in the Act. In a sense every individual whose activity in any way touches or affects the lives of those engaged in producing goods for interstate commerce contribute to such production, but we think Congress intended to limit the Act to those who directly contribute to the production of the goods." • • •
>
> "A contrary view to that expressed in the two foregoing cases [Fleming *v.* Arsenal Building Corporation, 38 F. Supp. 207 and Killingbeck, *et al. v.* Garment Center Capital, Inc., 20 N. Y. Supp. (2d) 521], was declared by Judge Kirkpatrick in Fleming *v.* A. B. Kirschbaum Co., 38 F. Supp. 204, but the decision in that case, if carried to its logical conclusion

[3] So far as we have been able to determine the decision has not as yet been officially reported. However a complete copy of the opinion is printed in the Appendix to this Petition, pp. 58-65, *infra*, and it also appears in 4 W. & H. Rep. 725.

would embrace every employee who in the remotest degree contributed to those who produced goods for interstate transportation, which, as heretofore stated, was not, in our opinion, the purpose of Congress."

Thus, of the six cases which have been decided involving the applicability of the Act to building service employees employed by the owner of a building leased to tenants, certain of whom were engaged in commerce or in the production of goods therefor, four hold the Act inapplicable. Of these four, three[4] proceed on the principle that the Act is not applicable to employees of an employer who himself is neither engaged in interstate commerce nor in the production of goods therefor, while the other[5] proceeds on the theory that such employees are not engaged in the production of goods for interstate commerce since their services do not directly contribute to such production.

With respect to the broader question as to whether the Act covers the employees of an employer who is neither engaged in interstate commerce nor in the production of goods therefor a more pronounced conflict exists.

In addition to the three cases above cited holding the Act inapplicable to the employees of an intrastate employer may be added the following: *Pederson* v. *J. F. Fitzgerald Construction Company*, 262 App. Div. 665, 4 W. & H. Rep. 661 (N. Y. Sup. Ct., Appellate Division, 3rd Dept. Nov. 12, 1941); *Gerdert* v. *Certified Poultry and Egg Company*, 38 F. Supp. 964 (D. C. S. D., Fla., April 29, 1941); *Farr* v. *Smith Detective Agency and Night Watch Service, Inc.*, 38 F. Supp. 105, 4 W. & H. Rep. 230 (D. C. N. D., Tex., April 14, 1941); and *Baggett* v. *Henry Fischer Packing Company*, 37 F. Supp. 670, 4 W. & H. Rep. 133 (D. C. W. D., Ky., Feb. 24, 1941).

[4] *Merryfield et al.* v. *F. M. Hoyt Shoe Corporation, et al., supra; Killingbeck & Riddoch* v. *Garment Center Capital, Inc., supra*, and *Cecil, et al.* v. *Gradison, et al., supra.*

[5] *Robinson* v. *Massachusetts Mutual Life Insurance Company, supra.*

Court decisions can of course be found containing dicta to the effect that the test of coverage is dependent solely upon the activities of the individual employee regardless of the nature of the businss in which the employer is engaged. However, those cases for the most part are of the type where it is apparent that the employer was engaged either in interstate commerce or in the production of goods therefor and thus the only question before the Court was whether the activities of the employees in question were of the requisite type to bring them within the Act.[6]

There are however decisions, in addition to the decision of the Third Circuit in the present case and that of the Second Circuit in *Fleming* v. *Arsenal Building Corporation, et al., supra,* holding that the test of coverage is dependent solely upon the activities of the individual employee regardless of the character of the employer's business. Representative of those cases is *Hall* v. *Warren Bradshaw Drilling Co.*, 40 F. Supp. 272 (N. D., Tex., July 18, 1941). But so far as we have been able to determine, cases directly so holding are in the minority; and it is significant that the courts which so hold have either misconstrued or completely ignored the legislative history of the Act. What could be clearer than the statement which Senator Claude Pepper, a member of the Senate Conference Committee which reported the bill which subsequently became the Act, made on the floor of the Senate at the time of the discussions of that bill preceding its passage.[7]

> "Mr. Pepper. If the Senator will allow me once more, I will not interrupt him further. On the contrary, the conference report provides that resort may be had to the circuit court of appeals by any petitioner who alleges that he is unlawfully affected by

[6] To this class of cases belongs *Sunshine Mining Co.* v. *Carver*, 34 F. Supp. 274 (D. C. Idaho, July, 1940).

[7] 83 Cong. Rec., p. 9168.

this bill, and *if he may be able to show that he is not engaged in commerce or is not engaged in the production of goods for interstate commerce it will be the duty of the court to exempt him from the application of the law.*" (Italics supplied.)

Not only in the Senate but in the House as well authoritative discussion seems clearly to support the view that the test of coverage depends not only upon the activities of the individual employee, but also upon the interstate character of the employer's business. Thus, Representative Schneider, a member of the Committee on Labor of the House (to whom Representative Welsh, a member of the Conference Committee and one of the managers of the bill in the House, yielded), in discussing the scope of the bill, stated:[8]

> "The measure as reported out by the conference report *applies to interstate business exclusively.* This is, of course, very well known. It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape or form affect intrastate or purely local or State business. *It covers only interstate commerce; that is business which is interstate in character.*" (Italics supplied.)

But the conflict in the decisions does not end here. As previously noted the Third Circuit in the present case held that elevator operators in a loft building, space in which was rented to tenants engaged in the production of goods for interstate commerce, "are also directly engaged in commerce."[9] The Second Circuit stated that it did not find it necessary to decide that question.[10]

On the other hand the Court of Appeals for the First Appellate District of Ohio in the case of *Cecil, et al.*, v.

[8] 83 Cong. Rec., p. 9260.

[9] *Fleming* v. *A. B. Kirschbaum Company* (R., p. 219, footnote).

[10] *Fleming* v. *Arsenal Building Corporation, et al.*, Appendix, p. 48, *infra*.

Gradison, et al., found to the contrary.[11] In its opinion it stated:

> "In *State, ex rel Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, the Court held that cab service maintained by the interstate railroad company to carry passengers to and from its terminus in New York—for which a separate charge was made—was not interstate commerce. At page 28 the Court said:
>
> 'If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is it not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?
>
> 'We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, * * *.'
>
> See also: Minn. *v.* Blasius, 290 U. S. 1.
>
> Therefore, where these plaintiffs, as employees of the defendants, handled articles for defendants and their tenants, they were performing intrastate acts preceding and following interstate transactions, and were not engaged in interstate commerce."

It is noteworthy that in the present case (as contrasted with the facts in the above opinion), the elevator operators do not in any sense handle the goods which remain at all times in the custody of representatives of the tenants or transportation agencies. Furthermore, Judge Woolsey, in *Fleming v. Arsenal Building Corporation, et al.*, 38 F. Supp. 207 (April 11, 1941), made the cryptic observation that elevator operators, "if considered as engaged in any

[11] See footnote 2, p. 13 of this Petition; also Appendix to this Petition, pp. 56-57, *infra*.

commerce, . . . were engaged in a vertical intrastate commerce and could not have been considered to have been engaged in interstate commerce in any proper sense."

As a result of this difference of opinion, elevator operators within the Third Circuit engaged in the operation of elevators in loft buildings space in which is leased to interstate tenants, can recover in the federal courts within that Circuit from their landlord employers the compensation provided for in the Act, whereas if they instituted suit in the state courts of Ohio, New York or Tennessee or in the Federal District Court of New Hampshire, they could not recover. If this be justice, elevator operators should make the most of it.

As if to add chaos to the already existing confusion, there is also wide divergence among the courts as to what activities constitute "production of goods for commerce" within the meaning of Section 3 (j) of the Act which provides as follows:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics supplied.)

The Second Circuit, conceding generally speaking the soundness of the argument that Congress could not have meant to impose labor standards upon every one who might chance to contribute any necessary service to the production of goods "produced for commerce," nevertheless was unwilling, as it said, to be drawn into "dialectical niceties" and contented itself with the pronouncement that the activities of the building service employees of the Arsenal Building Corporation were "necessary"

to the production of goods for commerce by the tenants in that building because, had they been employed by such tenants, their services would have been necessary to such production.[12]

The Third Circuit in the present case recognized no such difficulties or dialectical niceties. Apparently the Court, not impressed by what sometimes has been regarded as a limitation imposed upon Congress by the Constitution, construed the word "necessary" as used in the Act to be synonymous with "convenient and appropriate"; found that the services of the watchmen, carpenters and porters, although not indispensable, were "both convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce"; and thus concluded that, since the services of such employees were convenient and appropriate to the *maintenance of a loft building*, they must as a consequence be "necessary" to the *production activities of the tenants*.[13]

Courts of less temerity have taken issue with this view. In *Merryfield, et al.*, v. *F. M. Hoyt Shoe Corporation*, 41 F. Supp. 794, 795, 796 (Nov. 6, 1941), Judge Morris stated:

> "The plaintiffs [*i. e.* firemen, watchmen and maintenance men] had nothing to do with the actual manufacture of goods but were in the employ of the owners of the real estate . . .
>
> . . . . . .
>
> "I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act."

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[12] *Fleming* v. *Arsenal Building Corporation, et al.*; Appendix, pp. 48-50, *infra*.

[13] *Fleming* v. *A. B. Kirschbaum Company*, (R., pp. 219, 220).

Furthermore, in *Robinson* v. *Massachusetts Mutual Life Insurance Company*,[14] the Supreme Court of Tennessee stated:

> "As we interpret the Act, it is limited to those employees who contribute directly to the production of goods for interstate commerce. * * * In a sense every individual whose activity in any way touches or affects the lives of those producing goods for interstate commerce contribute to such production, but we think that Congress intended to limit the Act to those who directly contribute to the production of the goods."

And in *Cecil, et al.* v. *Gradison, et al.*, decided by the Court of Appeals for the First Appellate District of Ohio,[15] the Court said:

> "* * * the Act does not apply to employees of intrastate employers engaged to and actually performing intrastate acts, notwithstanding such intrastate acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

To the same effect is *Jewel Tea Company* v. *Williams*, 118 F. (2d) 202, 206 (C. C. A., 10th Cir., Mar. 6, 1941), where the Court stated:

> "The Act by its terms is limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be doubt as to the correctness of this interpretation, it is set at rest by the legislative history of the Act."[16]

Without wishing to be accused of engaging in "dialectical niceties," we venture to suggest that if the words "neces-

[14] See footnote 3, p. 15 of this Petition; also Appendix, pp. 61-62, *infra*.
[15] See footnote 2, p. 13 of this Petition; also Appendix, p. 58, *infra*.
[16] See also *Fleming* v. *Arsenal Building Corporation, et al.*, 38 F. Supp. 207

sary to production" are given the meaning attributed to them by the Third Circuit, there is no limit to which the coverage of the Act could not be carried. Thus, if the activities of the Petitioner's engineer, janitor or watchman are "necessary" to the production of goods by the Petitioner's tenants and thus constitute in themselves "production of goods for commerce," it could be asserted with equal logic that the employees of the concern which manufactures the elevators, boilers and generators used in the Petitioner's building, or the employees of the contractor who constructed the building, would be subject to the Act (assuming they were not otherwise covered), because their production of such equipment, or their construction of the building, was necessary to the production of goods for commerce by Petitioner's tenants.

Without engaging at this time in a discussion of the constitutional problems raised by the decision of the Third Circuit, it is sufficient to point out that such a holding not only involves a further extension of Congressional power over intrastate commerce, but constitutes an inroad upon local conditions and standards of such far reaching importance as to disturb the balance of a proper distribution of power between the state and national governments.

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be granted.

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JANUARY 28, 1942.

APPENDIX.

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying

that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division ~~which shall be under~~ the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In

the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representatives may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reason-

able per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in deter-

mining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible

without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such

classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after

such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be con-

clusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provisions of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under sec-

tion 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propogating, processing, marketing, freezing, canning, curing, storing or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions

contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental de-

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

ficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section

or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not

Approved, June 25, 1938.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87—October Term, 1941.

(Argued November 5, 1941 Decided December 30, 1941.)

PHILIP B. FLEMING,

Appellant,

—*v.*—

ARSENAL BUILDING CORPORATION *et al.*,

Appellees.

Appeal from a judgment of the District Court for the Southern District of New York, dismissing a complaint in an action to compel compliance with §7(a) of the "Fair Labor Standards Act of 1938."

Before:

L. HAND, CLARK and FRANK,

Circuit Judges.

IRVING J. LEVY for the appellant.

WALTER GORDON MERRITT for the appellees.

L. HAND, *C. J.*:

The plaintiff appeals from a judgment, dismissing after trial his complaint against the defendants—filed under §17 of the "Fair Labor Standards Act of 1938"—to restrain violation of §15(a)(2) of that act. The only question is whether §7(a) requires the defendants to pay "time and a half" to their employees. (We may ignore the defendant, Spear & Co., Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation, of which we shall speak as the defendant.) The facts are as

follows. The defendant owns a twenty-two story loft building in New York City, of which it lets out substantially all the space to manufacturers of women's clothes, who are concededly engaged in interstate commerce: i.e., they import part of their raw materials into the state and send out of the state a large part of the completed clothes. (With the exception of three of these manufacturers, the sales of two of whom were very small, the percentage of interstate shipments was in every case more than two-thirds; the percentage of the total shipments was 82.) All but two occupy less than a single story of the building; one occupies one and a half stories, and the other, five and a half. The defendant has no other business but leasing the space, collecting the rent and such services as are incidentally necessary: e.g., protecting the tenants' property, keeping the building itself clean, warm, lighted and in repair, furnishing steam and hot water, and manning and running the elevators. To render these services it employs 25 workmen of various sorts (besides a superintendent, concededly not within the act) and it has refused to pay them "time and a half" for overtime as defined by §7(a)(1) and §7(a)(2) of the act. The plaintiff's position is that, although these employees do not have any part in the actual handling of materials or of the finished goods (except insofar as running the elevators may be such) they are nevertheless "engaged in commerce" and "in the production of goods for commerce" within §7(a). The defendant denies this, and further asserts that it is in any case exempted by §13(a)(2) because the employees are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce." Finally it says that the act does not cover the employees of employers who are not themselves "engaged in commerce or in the production of goods for commerce." The district judge held that the employees were not "engaged in the production of goods for commerce," or "in commerce"; and that the defendant was a "service establishment" all of whose activity was intrastate.

We think that the employees here in question are "engaged * * * in the production of goods for commerce" within §7(a), and for that reason we do not find it necessary to decide whether they are also "engaged in commerce." First, are they engaged in the production of goods at all? Section 3(j) defines that phrase as meaning, "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." Whatever may be thought of the applicability of this definition down to the last clause, we are satisfied that the "occupation" of these men was "necessary to the production" of the clothes. If instead of leasing space in the defendant's building, the manufacturers had each owned and occupied a whole factory of his own, this conclusion seems to us scarcely debatable. Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another. Those who make and keep the factory fit for them in these ways are as "necessary" to "production" as they are themselves.# Yet it would as much defeat the purpose of the act, as expressed in §2, to deprive such workmen of its protection when they chance to be employed by a different employer, as when they are employed by the employer of the cutters and stitchers. And a competing dressmaker may find his rival's lower rent as "unfair" a differential against him in the cost of production, as lower wages; he will indeed feel it less directly, but it may still be felt. We may therefore start with the assumption that Congress did not mean to draw any line, based merely upon

Bowie v. *Gonzalez*, 117 Fed. (2d) 11, 20 (C. A. A. 1); *S. H. Robinson & Co.* v. *LaRue*, Sup. Ct. Tenn. Nov. 29, 1941; *Wood* v. *Central S. & G. Co.*, 33 Fed. Suppl. 40; *Lefevers* v. *General Export I. & M. Co.*, 36 Fed. Suppl. 838; *Muldowney* v. *Seaberg Elevator Co.*, 39 Fed. Suppl. 275; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 Fed. Suppl. 300. *Rogers* v. *Glazer*, 32 Fed. Suppl. 990; and *Goldberg* v. *Worman*, 37 Fed. Suppl. 778 concerned "retail establishments" and are not to the contrary.

the division of the same duties among several employers, unless the language of the act very plainly requires us to believe that it did. We can find none that compels us so to believe; on the contrary §3(i) which includes "parts and ingredients" of "goods" with the goods themselves, confirms our understanding. The history of the clause affords further confirmation; it originally read: "or in the making of tools or dies used in the production of such goods in any State." That obviously implied that the later use of the tools and dies—otherwise outside the act—might characterize them enough from the outset to put within it those who made them. The final form of words chosen was far more general, it is true, but there is no indication of any change in the original intent in this regard.

To this the defendant answers that it proves too much, for Congress could not have meant to impose "fair labor standards" upon everyone who might chance to contribute any necessary "ingredient," or service to the production of goods "produced for commerce." The miller who furnishes the flour to a baker who sells bread in other states could not have been intended; or the cutler who sells knives to a wholesale butcher; or the service station which repairs and fills a manufacturer's trucks; or the chemist who supplies alcohol to a perfumer. Stated so generally, the argument may be sound; at any rate we will assume arguendo that the purveyor of "ingredients" or services to all-comers at random will not find himself within the act merely because some part of what he sells eventually finds its way into "goods produced for commerce." Perhaps in the end it will turn upon the distribution of his customers among those who are engaged in interstate commerce and those who are not; here, as so often, the test may be one of degree. We need not answer, for here at any rate no such dilemma presents itself. As we have said, the work of the defendant's employees is in kind substantially the same as it would be if the manu-

facturers employed them directly. That is the substance of the matter. Since the words and the purpose of the act coalesce so far, we will not allow ourselves to be drawn into dialectical niceties which are not before us and whose answer need not compromise the step we are taking.

Nor do we think that the defendant is a "service establishment the larger part of whose * * * servicing is in intrastate commerce"; §13(a)(2). Possibly it is not a "service establishment" at all; perhaps that phrase should be limited to those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and "servicing" does indeed suggest as much. But it is enough for our purpose that, if it is a "service establishment," at least its exemption must depend upon the extent to which its servicing is intrastate. Suppose for example, that these manufacturers, instead of pressing the clothes themselves, sent them out to other shops which pressed only for them; the fact that the pressing took place in the same state as the cutting and stitching would not, we think, exempt the pressers; their servicing would be "in interstate commerce." The "servicing" being a part of "production," the test should be what kind of production it is a part of. The question is really the same as that we have just considered: i. e., whether it is important how that production is divided among employers. It cannot be that if the exemption extends beyond retail "servicing," it is the character of the "servicing" itself that counts, divorced from the "production" of which it is a part. Again, we should be met by the anomaly arising from such an interpretation—the capricious incidence of the act resulting from the accident of the industrial division of the whole process.

The defendant's last argument is based upon §§5 and 8, which prove, it says, that the act covers only the employees of employers who are themselves "engaged in" interstate

commerce. Acknowledging, as it must, that §6 commands "every employer" without limitation to "pay to each of his employees" the standard wage, and that §7 declares that "no employer" shall "employ any of his employees" for more than the prescribed hours, the defendant rests its argument upon the constitution and functions of the "industry committees." Since these must be composed only of employers "engaged in" interstate commerce, and since they have power to fix the rate of wages, the argument is that the act cannot apply to employers who are not represented upon them. We do not agree. Section 5(a) does not confine the "Administrator" to committees for "each industry engaged in commerce"; he may also appoint them for industries "engaged * * * in the production of goods for commerce." One third of its membership must, it is true, "represent employers in the industry"; and §8 gives power to the committees to fix the wage in the "industry" (not over 40 cents an hour) and to report to the "Administrator," who is to approve the report "if he finds that the recommendations are made in accordance with law, are supported by the evidence * * * and * * * will carry out the purposes of this section"; otherwise he is to refer back the question to the same or another committee. (Subd. d.) Section 3(h) defines an "industry" as including not only a "branch" of an industry, but "a group of industries."

It is certainly undesirable, and it is probably impossible, to define with accuracy just what are the limits imposed upon the "Administrator's" choice by §5, but if we read subdivisions a and b together and interpolate in their proper places the definitions of §3(h) and §3(j), we get substantially the following. The "Administrator" is directed to appoint a number of persons "representing employers" for each "group of industries" whose employees are "employed * * * in any process or occupation necessary to the production" of "goods for commerce." Certainly this grants him the power if he thinks best to

put upon one committee an employer "engaged • • • in the production of goods for commerce," like the defendant, with employers "engaged in interstate commerce," like the tenants. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 149, 150. The history of §§6 and 7 in Congress leaves no doubt that this is the right view. In the Senate the sections read in substance as they now do, though the wording was somewhat different (Senate Bill 2475 passed July 31, 1937). The House amended them to limit them to employers engaged in commerce or in industry affecting commerce (taking the view now urged by the defendant) and to include all the employees of such employers. The conference report particularly dealt with this difference (House Report 2738, 75th Congress 3rd Session pp. 29 and 30) and declared that the only test should be the occupation of the employees; Senator Pepper, one of the managers in the Senate, expressly stated on the floor that this was its meaning.

As has already appeared from the decisions cited, the question now at bar has come up a number of times when the ancillary service was performed by employees of the same employer who was himself "engaged in commerce"; and the result has been fairly uniform. We have found five decisions of appellate courts which have dealt with employees of an employer, who was not "engaged in commerce," or whom at least the courts treated as not so "engaged." So far the score is four to one against the view we take. In *Killingbeck* v. *Garment Center Capitol Inc.*, 259 App. Div. 691; *Robinson* v. *Massachusetts Mutual Life Insurance Co.* (Sup. Ct. Tenn. Nov. 29, 1941); *Cecil* v. *Gradison* (Ohio Ct. App. 1st Dist. Nov. 17, 1941); and *Pederson* v. *Fitzgerald Construction Co.* (N. Y. App. Div. 3rd Dept. Nov. 12, 1941) it was held the act did not apply to employees who were assisting in the work of another employer, himself "engaged in commerce." It is true that in some of these it would have been something of a strain upon the word, "production," to say that the em-

ployees were "engaged in the production of goods" at all; but it is doubtful that the courts meant to rely upon any such distinction, and it is for this reason that we count them against our view. On the other hand the Third Circuit in *Fleming* v. *Kirschbaum Co.*, 123 Fed. (2d) , agrees with us and indeed in one or two matters went further than we have found it necessary as yet to go. In the district courts *Farr* v. *Smith Detective A. & N. W. Service Inc.*, 38 Fed. Suppl. 105, went off upon the fact that the ancillary services to the employer engaged in interstate commerce were occasional; but *Allen* v. *Moe*, 39 Fed. Suppl. 5, must be counted with *Fleming* v. *Kirschbaum Co.*, though it is not on all fours.# Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling.

Judgment reversed.

APPEAL ON QUESTIONS OF LAW, FROM COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO.

HAMILTON COUNTY, No. 6009.

IN THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO.

James B. Cecil, and Emil Telthester,
Appellants,

v.

Willis D. Gradison, et al., Trustees, etc.,
Appellees.

OPINION.

NOVEMBER 17, 1941.

Mr. Leonard J. Dempsey, for Appellants,
Messrs. Steer, Strauss & Adair, for Appellees.

MATTHEWS, *P. J.*

This is an action by employees to recover under the provisions of the Act of Congress, known as the Fair

Merryfield v. *Hoyt Shoe Corp.*, U. S. D. C. N. H., is to the contrary.

Labor Standards Act (52 Stat., 1060, 29 U. S. C. A. 201, *et seq.*) for overtime, at the rate of one and one-half times the regular contractual rate. The trial court sustained a demurrer to the amended petition on the ground that it did not state a cause of action and the plaintiffs not desiring to plead further, judgment was rendered in favor of the defendants.

The only question presented by this record is whether the court erred in sustaining the defendants' demurrer.

The plaintiffs alleged in the amended petition that the defendants own premises known as 406 Elm Street, Cincinnati, Ohio, which they "maintain, operate, control, manage and direct the Peoples Bank Building" located therein.

It is also alleged that certain of the defendants conducted a banking business in part of said building.

It is also alleged that the defendants employed one of the plaintiffs as a janitor and the other as an engineer, and that each was required to operate the elevators in the building, both freight and passenger, and that "in engaging in and upon his various duties in and about said building and said bank for said defendants, he was caused to handle shipments of all and varied kind and description, such as, packages, cartons, cardboard and wooden cases, heavy and light boxes. Such shipments were constantly transported, forwarded * * * and shipped to persons and corporations in other cities beyond the boundaries of the state of Ohio."

It is also alleged that this activity was in furtherance of his employers' business, and that without it, the packages, etc., moving into and out of the building, into and from the various tenants of the various floors, could not have been transported up or down the elevators, or pass from the control of the shipper or tenant to the person to whom the same was directed.

There is no positive statement that the plaintiffs were engaged in interstate commerce, unless the activity de-

scribed constitutes such commerce. There is an allegation that the plaintiffs were "engaged in an occupation necessary for the production of goods for commerce," which is not equivalent to a statement that they were engaged in production of goods for commerce, particularly in view of the specific description of the nature of plaintiff's activities.

The power conferred upon Congress by the "Commerce Clause" (Const. Art. I, sec. 8) extends not only to the making of the rules to govern all the persons, instrumentalities, and commodities while in the channel of interstate commerce, but also the power to protect the flow of interstate commerce from any and all harmful interference or influence from intrastate acts outside the channel, but so closely and intimately connected with the interstate transaction as to substantially affect it. National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1; U. S. *v.* Darby Lumber Co., 312 U. S. 100.

It is clear from the cases that goods which are produced for interstate commerce may be handled and transported after they are produced, and before they enter the interstate channel, and that those engaged in handling them would not be engaged either in interstate commerce or in producing for interstate commerce.

In construing the Fair Labor Standards Act of 1938, the extent of the powers of Congress over interstate commerce must be taken into account.

Production is not commerce, either interstate or intrastate. Products—the results of production—may be the objects of commerce. Until the article produced enters the channel of interstate commerce or the activity in relation to it approaches that channel so closely as to directly and substantially affect the flow in the interstate channel, the article and the activity in relation to it remain under the exclusive power of the states.

Now when does the interstate transaction begin? That is answered by the case of Coe *v.* Errol, 116 U. S. 517, at 525, where the court said:

> "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, * * *."

And having entered the channel of interstate commerce, the article continues until the end of the interstate journey. In State, *ex rel* Pennsylvania Railroad Co. *v.* Knight, 192 U. S. 21, the court held that cab service maintained by the interstate railroad company to carry passengers to and from its terminus in New York—for which a separate charge was made—was not interstate commerce. At page 28, the court said:

> "If the cab which carries the passenger from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage

also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

"We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, . . ."

See also: Minn. *v.* Blasius, 290 U. S. 1.

Therefore, where these plaintiffs, as employees of the defendants, handled articles for defendants and their tenants, they were performing intra-state acts preceding and following interstate transactions, and were not engaged in interstate commerce.

Now, as already stated the Congress under its power to regulate interstate commerce can protect the interstate transaction from harmful extraneous intrastate activities, and where such activities are commingled with or are so closely and directly associated with the interstate transaction as to constitute a continuous threat to the free and uncorrupted flow, regulation of such activity is an appropriate means of exercising the power to regulate interstate commerce. Production by one engaged in interstate commerce bears that close relationship to the interstate business of the producer which warrants its regulation by Congress in order to protect the interstate business.

A reading of the declaration of policy contained in Section 202 and the definition of terms makes it clear that Congress meant to protect the interstate transaction from sub-standard labor conditions by regulating such conditions in the interstate transaction and those transactions that directly and substantially affect the interstate transaction. Beyond that, Congress could not go.

Accordingly, the language of Section 206, U. S. C. A., that "every employer shall pay to each of his employees *engaged in* commerce or in the production of goods for *commerce* wages at the following rates" and the provision

in Section 207 that "No employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce," must be limited by the declared purpose in Section 202 and the definition of terms in Section 203, in order to confine the act within the constitutional power of Congress.

And when so read and limited it is clear that the Act does not apply to employees of intra-state employers engaged in and actually performing intra-state acts, notwithstanding such intra-state acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related. And that this was the intention of Congress is made clearer by the provisions of Section 213, exempting from the operation of the act "any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intra-state commerce."

We are of opinion that the amended petition does not state a cause of action and that no error was committed in sustaining the demurrer thereto.

For these reasons, the judgment is affirmed.

Filed Nov. 29, 1941.

S. E. CLEAGE,
Clerk

HAMILTON & ROSS, *J. J.*, Concur.

TENNESSEE SUPREME COURT.

Horace Lee Robinson, Plaintiff in Error,

v.

Massachusetts Mutual Life Insurance Company, Defendant in Error.

Decided November 29, 1941.

MCKINNEY, *Justice*:—The question before us is whether plaintiff in error and those for whom he sues are subject

to the provisions of the Fair Labor Standards Act of 1938, Chapter 676, 52 Stat. 1060. The issue was raised by demurrer to the declaration which the trial court sustained and dismissed the suit.

The defendant in error is a corporation with its main office in Massachusetts, but with a local office in Knoxville, Tennessee. It is engaged in writing life insurance and in such other activities as are usually carried on by like organizations, and it may be conceded that in the prosecution of its insurance business it is engaged in interstate commerce. It is averred in the declaration:

"That in furtherance of its business of investing capital received from policyholders as premiums on insurance contracts, the defendant became the owner of and operator of three office buildings situated in the Sixth Ward of the City of Knoxville, a municipal corporation located in Knox County, Tennessee, known as the 'Union Building,' located at 410 Union Street, the 'Daylight Building,' located at 506 Union Street, and the 'New Sprankle Building,' located at 508 Union Street, in which are located business offices for rent, and the money received from this rent is controlled and allocated by the defendant from its main office in Massachusetts, either directly or through its district office in Atlanta, Georgia, and used in the furtherance of its said business.

"That the defendant rents said buildings exclusively or more than 90% of space in said buildings to the Tennessee Valley Authority, which builds and operates dams in the streams of Tennessee, Alabama, North Carolina, and Kentucky, to make said streams navigable for interstate commerce, and to generate electricity and buys electricity generated in states other than the State of Tennessee, amongst them being North Carolina and Alabama, and after the electricity thus generated is comingled together, the same is sold and delivered by transmission lines to business concerns located in Tennessee and in states other than the State of Tennessee."

Defendant in error does not have an office or conduct any of its business in either of these buildings.

The declaration further avers:

"That the plaintiff individually and those for whom he sues as agent and other employees similarly situated, are employed by the defendant as firemen, cleaners and washers, etc., and assigned to keep said building clean and in rentable condition, which are duties necessary to keep said office space in a rentable condition, which is a necessary occupation or activity in the prosecution of the defendant's said business."

It is then alleged that plaintiff in error and those for whom he sues come within the provisions of said statute, and that, as such employees for the past two and one-half years, they are entitled to back wages, liquidated damages, and attorney's fees as provided therein.

The purpose of the Act, as stated by Mr. Justice Stone in The United States of America v. F. W. Darby Lumber Company and Fred W. Darby, 312 U. S. 100, 85 L. ed. 609, "is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees' appointed by him."

The Act applies to every employee "who is engaged in commerce or in the production of goods for commerce."

The following definitions appearing in three subsections of Section 3 of the Act are pertinent:

(b) " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

(i) " 'Employee' includes any individual employed by an employer."

(j) " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Counsel agree that an employee seeking back wages must show that he is engaged in interstate commerce or in the production of goods for interstate commerce. The mere fact that the employer is engaged in interstate commerce or in the production of goods for interstate commerce is not sufficient to bring the employee within the purview of the Act. An employer may be engaged in both interstate and intrastate commerce and some of its employees concerned solely with its intrastate business. This conclusion is supported by the following authorities which are cited in the briefs of counsel: Bagby *et al. v.* Cleveland Wrecking Co., 28 Fed. Supp. 271, 272; Foster *v.* National Biscuit Co., 31 Fed. Supp. 553; Gates *v.* Graham Ice Cream Co., 31 Fed. Supp. 854; Wood *v.* Central Sand & Gravel Co. *et al.*, 33 Fed. Supp. 40, 46; Reck *v.* Zarnocay, S. Ct. Trial Term, New York City, N. Y., NYLJ, June 4, 1941, p. 2509.

We are of opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce. We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act,

it is limited to those employees who contribute directly to the production of goods for interstate commerce.

If the defendant in error were conducting its interstate insurance business in those buildings, the result might be different.

The only thing which it can be said that defendant in error produces in the operation of these office buildings is rent in the form of money. While money, in a sense, may be treated as commerce it is not ordinarily so considered, but in the ordinary acceptation of the term it is defined as merely a medium of exchange. Republic Acceptance Corporation *v.* Bennett, 220 Mich. 249, 189 N. W. 901; Boddy *v.* Continental Inv. Co., 18 Ala. App. 65, 88 So. 294.

In Sunshine Mining Co. *v.* Carver, 34 Fed. Supp. 274, 277, it is said:

"The expressions 'produced' and 'goods' in the Act indicate that Congress intended the Act to apply to employees engaged in producing goods which are processed further or changed as to form by other persons before going into Interstate commerce and the employee who produces goods which form an ingredient or part of other goods which go into interstate commerce is 'engaged in the production of goods for interstate commerce.'"

If this is a proper interpretation of the Act, and we think it is, then the Congress did not intend that the words "goods, wares, products, commodities, merchandise, or articles or subjects of commerce" should embrace and include "money."

We are unable to agree that the mere fact that the Tennessee Valley Authority, with offices in these buildings, generated electricity at other places and transmitted current in interstate commerce is sufficient to relate complainant to such commerce. Plaintiff in error and those for whom he sues are one step removed from the class of employees embraced in the Act. In a sense every in-

dividual whose activity in any way touches or affects the lives of those engaged in producing goods for interstate commerce contribute to such production, but we think Congress intended to limit the Act to those who directly contribute to the production of the goods. The line of demarcation has to be drawn somewhere, and that designated in the opinion in Sunshine Mining Co. *v.* Carver, *supra,* seems to us to conform to the legislative intent and harmonizes with the purpose of the Act as hereinabove set forth.

The most recent case to which our attention has been directed, in which this question was considered, is that of Fleming *v.* Arsenal Bldg. Corporation, 38 Fed. Supp. 207, 211-212, from which we quote from the opinion of Judge Woolsey as follows:

"The Fair Labor Standards Act does not, however, as does the National Labor Relations Act, extend the limit of the federal jurisdiction to any act '*affecting* commerce.' Cf. 29 U. S. C. A. §§152 (7), 159(c) and also National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, at pages 2932, 57 S. Ct. 615, 81 Ed. 893, 108 A. L. R. 1352.

"The limits of the federal jurisdiction under the Fair Labor Standards Act is extended only to employees 'engaged in commerce or in the production of goods for commerce.' 29 U. S. C. A. §§203, 206, 207.

"Thus the connection of the employees who come under the Fair Labor Standards Act must be direct with commerce, as defined in that act. This involves an obviously narrower concept than the words '*affecting* commerce' used in the National Labor Relations Act which was cited as an analogy by the Government Counsel during the argument of this cause.

"Furthermore, the legislative history of the Fair Labor Standards Act shows clearly, I think, that as a result of the Conference between the Committees of the two Houses of Congress, the words '*production of goods for commerce*'

were substituted for the words '*affecting commerce*' which had been contained in the successive drafts of the statute during its embryonic stages. Cf. 75th Congress, 1st Session, Report No. 884, of July 6, 1937, by Senator Black, of the Senate Committee on Education and Labor; 75th Congress, 1st Session, Report No. 1452, of August 6, 1937, by Mrs. Norton, of the House Committee on Labor; 75th Congress, 3rd Session, Report No. 2182 (at page 2), of April 21, 1938, by Mrs. Norton, of the House Committee on Labor; 75th Congress, 3rd Session, Report No. 2738, of June 11, 1938, being the Conference Report made by Mrs. Norton, of the House Committee on Labor; see, also, 'The coverage of the Fair Labor Standards Act and other Problems in its Interpretation,' to be found in '*Law and Contemporary Problems; The Wage and Hour Law*'—published by the School of Law of Duke University, in the summer of 1939, Volume 6, No. 3, pages 334-352, especially pages 338-339.

"This indicates quite graphically that when the Fair Labor Standards Act of 1938 was passed the intent of Congress was that its ambit should be narrower than the ambit of the National Labor Relations Act, and consequently, it seems perfectly clear to me, that the employees of the defendants are not to be considered as included within the Fair Labor Standards Act of 1938.

"The acts of these employees might '*affect* commerce,' but I find that they did not function in the '*production of goods for commerce*' even under the broad definition of 'produce' given by the statute and quoted above.

"I find, therefore, that the employees of the defendants were not working in manufacturing establishments producing goods for commerce."

The facts of that case, as set forth in the seventh syllabus, are as follows:

"Where sole business of building owner was limited to the leasing of space in its building to tenants, the maintenance of its building in good order and condition

and rendering to its tenants, many of whom were engaged in manufacture of goods for interstate commerce, the ordinary type of service customary in the operation of office building, the owner was not a 'manufacturing establishment' engaged in the 'production of goods for commerce,' and therefore its employees were not entitled to protection of the Fair Labor Standards Act."

Under similar facts the Supreme Court of New York in Killingbeck *et al. v.* Garment Center Capital, Inc., 20 N. Y. Supp. (2nd) 521, held that the employees were not protected by the Fair Labor Standards Act.

A contrary view to that expressed in the two foregoing cases was declared by Judge Kirkpatrick in Fleming *v.* A. B. Kirschbaum Co., 38 Fed. Supp. 204, but the decision in that case, if carried to its logical conclusion, would embrace every employee who in the remotest degree contributed to those who produced goods for interstate transportation, which, as heretofore stated, was not, in our opinion, the purpose of Congress.

For the reasons set forth herein, we feel constrained to overrule the assignments of error and affirm the judgment of the trial court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. 910.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation,
Petitioner,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

WM. CLARKE MASON,
FREDERICK H. KNIGHT,
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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	5
SPECIFICATION OF ERRORS TO BE URGED	8
ARGUMENT	9
I. Preliminary Statement	9
(1) The principles relied on by the Petitioner and the judicial recognition accorded them	9
(2) The constitutional doubts attending the Administrator's position	12
(3) The undesirability of extending extraordinary Federal control in the absence of a clear Congressional intent to do so	13
II. Petitioner's maintenance and service employees, being employed by the owner of a loft building whose only business is the rental, operation and maintenance of such building in Philadelphia, are not employees of an employer engaged in interstate commerce or in the production of goods therefor and consequently are not covered by the Act	16
(1) Related sections of the Act and their legislative history	17
(a) Section 2 of the Act and its legislative history	17
(b) Sections 5 and 8 of the Act and their legislative history	20
(c) Section 11 of the Act and its legislative history	25
(2) The scope of Sections 6 and 7 of the Act as established by the legislative history	28
(a) The Senate bill	31
(b) The Conference Committee bill	33
(3) Petitioner's interpretation is confirmed by administrative and constitutional considerations deemed important by Congress	39
(a) Administrative flexibility vs. blanket standards	39
(b) Congressional regard for doubts as to the extent of its power to regulate wages and hours	41
(4) Judicial authority	44

PAGE

III. Petitioner's maintenance and service employees are not engaged in the production of goods for interstate commerce within the meaning of the Act and consequently are not covered by it 49

(1) Preliminary statement; Administrator's contention 49

(2) The statutory definition of the word "produced" as contained in Section 3(j) of the Act 51

(3) Legislative history 55

(4) Judicial authority 59

(5) Conclusion 66

IV. Petitioner's elevator operators are not engaged "in commerce" 69

V. Petitioner is exempted from the wage and hour provisions of the Act as a service establishment, under Section 13(a) (2) 75

(1) The building service cases 76

(2) The language of Section 13(a) (2) 79

(3) The legislative history of Section 13(a) (2) 80

(4) Judicial authority 85

(5) Petitioner's servicing is unquestionably in intrastate commerce and the exemption should be given effect 89

VI. If the Act be held applicable to Petitioner's service and maintenance employees it would contravene the Tenth Amendment to the Constitution 94

CONCLUSION 100

TABLE OF CITATIONS.

CASES:

Abadie v. Cudahy Packing Company, 37 F. Supp. 164 (E. D. La. 1941) 48, 60, 62

Allen v. Moe, 39 F. Supp. 5 (D. Idaho N. D. 1941) 48

Apex Hosiery Company v. William Leader, 310 U. S. 469 (1940) 13, 70

Baggett v. Henry Fischer Packing Company, 37 F. Supp. 670 (W. D. Ky. 1941) 47

Baltimore & Ohio S. W. R. R. v. Burtsch, 263 U. S. 540 (1924) 74

Barfoot v. White Star Line, 170 Mich. 349, 136 N. W. 437 (1912) 88, 89

Beatty v. Foutz Tool Co., F. Supp. , 5 W. & H. Rep. (259 S. D. Cal., Mar. 23, 1942) 86

Bowie v. Gonzalez, 117 F. (2d) 11 (C. C. A. 1st, 1941) 60

Bowman v. Pace, 119 F. (2d) 858 (C. C. A. 5th, 1941) 60, 65

Boyd v. Dowell, Inc., 5 C. C. H. Labor Cases Par. 60,770 (N. M. Dist. Ct., Lea Co., Feb. 11, 1941) 49

PAGE

Boylan *v.* Liden Manufacturing Co., 4 W. & H. Rep. 158 (C. C. Mich., Ingham Co., 1941) 87

Brown *v.* Bailey, 147 S. W. (2d) 105 (Tenn. Sup. Ct., Feb. 3, 1941) 59

Brown *v.* Carter Drilling Co., 38 F. Supp. 489 (S. D. Tex., 1941) 59

Carlton *v.* London Mines and Milling Co., 4 W. & H. Rep. 561 (Colo. Dist. Ct., Sept. 8, 1941) 59, 61

Carter *v.* Carter Coal Co., 298 U. S. 238 (1936) 42

Cecil, *et al. v.* Gradison, *et al.*, 4 W. & H. Rep. 698 (Ohio Ct. App., 1st Dist., Nov. 17, 1941) printed in Petition for Certiorari, p. 53 ..... 10, 19, 45, 60, 63, 72, 77, 98

Chapman *et al. v.* Home Ice Co., — F. Supp. —, 5 W. & H. Rep. 133 (W. D. Tenn., Jan. 25, 1942) 58, 99

Chicago B. & Q. R. R. Co. *v.* Harrington, 241 U. S. 177 (1916) 71

Chicago & E. I. R. R. Co. *v.* Ind. Comm., 284 U. S. 296 (1932) 71

Chicago R. I. & P. R. R. *v.* Bond, 240 U. S. 449 (1916) 71

Cincinnati Soap Co. *v.* United States, 301 U. S. 308 (1937) 23

Collins *v.* Kidd, 38 F. Supp. 634 (E. D. Tex., 1941) 91

Commonwealth *v.* Arrott Mills Co., 145 Pa. 9 (1891) 88, 89

Consolidated Edison Company of New York, Inc. *v.* National Labor Relations Board, 305 U. S. 197 (1938) 12, 96, 97

David *v.* Boylans, 34 F. Supp. 555 (E. D. La. 1940) 60, 65

Delaware L. & W. R. R. Co. *v.* Yurkonis, 238 U. S. 439 (1915) 71

DeLima *v.* Bidwell, 182 U. S. 1 (1901) 23

Doyle *v.* Johnson Bros., 25 N. Y. Supp. (2d) 603, 28 N. Y. Supp. (2d) 452 (N. Y. City Court, Kings Co., 1941) 60

Duncan *v.* Montgomery-Ward, 42 F. Supp. 879 (S. D. Tex. 1941) 92

Elam *v.* Wolberg, 5 W. & H. Rep. 136 (Tenn. Chanc. Ct., Jan. 29, 1942) 73

Electric Bond and Share Co. *v.* Securities and Exchange Commission, 303 U. S. 419 (1938) 20

Erie R. R. *v.* Shuart, 250 U. S. 465 (1919) 74

Farr *v.* Smith Detective Agency and Night Watch Service, Inc., 38 F. Supp. 105 (N. D. Tex. 1941) 46, 60, 65

Federal Trade Commission *v.* American Tobacco Company, 264 U. S. 298 (1924) 12

Federal Trade Commission *v.* Bunte Brothers, Inc., 312 U. S. 349 (1941) 14, 70

Fleming *v.* American Stores Company, 42 F. Supp. 511 (E. D. Pa. 1941) 35

Fleming *v.* Arsenal Building Corporation, 38 F. Supp. 207 (S. D. N. Y. 1941) 73, 76, 77, 90

Fleming *v.* Arsenal Building Corporation, 125 F. (2d) 278 (C. C. A. 2d., Dec. 30, 1941) 9, 44, 48, 62, 66, 73, 77, 78, 90, 91

Fleming *v.* Atlantic Co., 40 F. Supp. 654 (N. D. Ga. 1941) 60

Fleming *v.* Goldblatt Bros., Inc., 39 F. Supp. 701 (N. D. Ill. 1941) 48

PAGE

Fleming *v.* Pearson, 39 F. Supp. 300 (E. D. Tenn. 1941) 60

Fleming *v.* Peoples Packing Co., Inc., 42 F. Supp. 868 (W. D. Okla., 1942) 99

Fleming *v.* Swift, 41 F. Supp. 825 (N. D. Ill. 1941) 60

Fleming *v.* Tidewater Optical Co., 35 F. Supp. 1015 (E. D. Va. 1940) ... 86

General Tobacco and Grocery Co. *v.* Fleming, F. (2d) , 5 W. & H. Rep. 103 (C. C. A. 6th, Feb. 5, 1942) 26, 28, 47

Gerdert *v.* Certified Poultry and Egg Co., 38 F. Supp. 964 (S. D. Fla. 1941). 48

Gibson *v.* Glasgow, 157 S. W. (2d) 814 (Tenn. Sup. Ct., Jan. 17, 1942) 73

Hall *v.* Warren-Bradshaw Drilling Co., 40 F. Supp. 272 (N. D. Tex. 1941). 48

Hargrave *et.* Mid-Continent Petroleum Corp., 36 F. Supp. 233 (E. D. Okla. 1941) 60

Harrison *v.* Kansas City Terminal Ry. Co., 36 F. Supp. 434 (W. D. Mo. 1941) 74

Hart *v.* Gregory, 16 S. E. (2d) 837 (N. C. Sup. Ct., Oct. 15, 1941) ... 59, 60, 61

Houston, East and West Texas Railway Co. *v.* United States, 234 U. S. 342 (1914) 14

Jewel Tea Co. *v.* Williams, 118 F. (2d) 202 (C. C. A. 10th, 1941) 58

Johnson *v.* Filstow, Inc., F. Supp. , 5 W. & H. Rep. 286 (S. D. Fla. Mar. 30, 1942) 11, 45, 59, 64, 72, 77

Killingbeck & Riddoch *v.* Garment Center Capital, Inc., 259 App. Div. 691, 20 N. Y. Supp. (2d) 521 (1940) 9, 45, 62-63, 72, 77

Labates *v.* Interstate Co., F. Supp. , 4 W. & H. Rep. 91 (W. D. Tenn. 1941) 87

Lefevers *v.* Gen. Export & Metal Co., 36 F. Supp. 838 (S. D. Tex. 1940) .. 60

Magann *v.* Long's Baggage Transfer Co., 39 F. Supp. 742 (W. D. Va. 1941). 74

McCulloch *v.* Maryland, 4 Wheat. 316 (1819) 53

McMillan *v.* Wilson, 4 W. & H. Rep. 409 (Minn. Dist. Ct., June 13, 1941). 60

Merryfield, *et al. v.* F. M. Hoyt Shoe Corporation, *et al.*, 41 F. Supp. 794 (D. N. H. 1941) 10, 45, 59, 60, 64, 67, 72, 77

Missouri Pacific Railroad *v.* Boone, 270 U. S. 466 (1926) 12

Mitchell *v.* N. Y. Life Ins. Co., 75 F. (2d) 107 (C. C. A. 7th, 1934) 72

Muldowney *v.* Seaberg Elevator Co., 39 F. Supp. 275 (E. D. N. Y. 1941) .. 60, 86

National Labor Relations Board *v.* Carroll, 120 F. (2d) 457 (C. C. A. 1st, 1941) 74

National Labor Relations Board *v.* Benjamin Fainblatt, *et al.*, 306 U. S. 601 (1939) 12, 97

National Labor Relations Board *v.* Jones & Laughlin Steel Corporation, 301 U. S. 1 (1937) 12, 42, 43, 95

Nebbia *v.* New York, 291 U. S. 502 (1934) 42

Overstreet *v.* North Shore Corp., F. Supp. , 4 W. & H. Rep. 628 (S. D. Fla. 1941) 59

PAGE

Pedersen *v.* J. F. Fitzgerald Construction Co., 262 App. Div. 665 (N. Y. Sup. Ct., App. Div., Nov. 12, 1941) 46, 59, 65

Pickett *v.* Union Terminal Co., 86 L. Ed. Adv. Ops. 598 (U. S. S. C. March 2, 1942) 74

Poff *v.* Washington Terminal Co., 69 F. (2d) 572 (App. D. C. 1934) 71

Porter *v.* Wilson, F. Supp. , 5 W. & H. Rep. 152 (N. D. Tex. 1942) 73

Price *v.* Forrest, 173 U. S. 410 (1899) 20

Puget Sound Stevedoring Co. *v.* State Tax Commission, 302 U. S. 90 (1937) . 74

Rauhoff *v.* Gramling, 42 F. Supp. 754 (E. D. Ark. 1941) 73

Reck *v.* Zarnocay, 4 W. & H. Rep. 305 (N. Y. Sup. Ct., N. Y. Co., 1941) . 48

Robinson *v.* B. & O. R. R. Co., 237 U. S. 84 (1915) 71

Robinson *v.* La Rue, 156 S. W. (2d) 432 (Tenn. Sup. Ct. Nov. 29, 1941) .. 60

Robinson *v.* Massachusetts Mutual Life Insurance Company, 158 S. W. (2d) 441 (Tenn. Sup. Ct., Nov. 29, 1941) Printed in Petition for certiorari, p. 58 ..... 11, 44, 60, 63, 72, 77

Rogers *v.* Glazer, 32 F. Supp. 990 (W. D. Mo. 1940) 59

Santa Cruz Packing Company *v.* National Labor Relations Board, 303 U. S. 453 (1938) 12, 13, 84, 95

Seaver *v.* Bradley, 179 Mass. 329, 60 N. E. 795 (1901) 71-72

Shanks *v.* D. L. & W. R. R. Co., 239 U. S. 556 (1916) 71

Southern R. R. Co., *v.* Taylor, 16 F. (2d) 517 (App. D. C. 1926) cert. denied 273 U. S. 767 71

Stucker *v.* Roselle, 37 F. Supp. 864 (W. D. Ky. 1941) 87

Sunshine Mining Co. *v.* Carver, 34 F. Supp. 274 (D. Idaho, 1940) 48

Super-Cold Southwest Co. *v.* McBride, 124 F. (2d) 90 (C. C. A. 5th, 1941) .. 86, 92

Sybert *v.* Bradley, F. Supp. , 4 W. & H. Rep. 630 (S. D. Ill. 1941) .. 60, 65

Tapp *v.* Price-Bass, 5 W. & H. Rep. 155 (Tenn. Chan. Ct., Feb. 1942) ... 73

The Daniel Ball, 10 Wall. 557 (1870) 74

Thompson *v.* Daugherty, 40 F. Supp. 279 (D. C. Md. 1941) 74

Union Stock Yard Co. *v.* United States, 308 U. S. 213 (1939) 74

United States *v.* American Trucking Associations, Inc., 310 U. S. 534 (1940) 25

United States *v.* F. W. Darby Lumber Co., 312 U. S. 100 (1941) 12, 94-95, 96, 98, 99

United States *v.* Delaware and Hudson Company, 213 U. S. 366 (1909) .. 12

Veazey Drug Co. *v.* Fleming, 42 F. Supp. 689 (W. D. Okla. 1941) 73, 99

Wagner *v.* United Dividend Corp., 5 W. & H. Rep. 138 (Colo. Dist. Ct., Jan. 2, 1942) 73

Warren-Bradshaw Drilling Co. *v.* Hall, 124 F. (2d) 42 (C. C. A. 5th, Dec. 9, 1941) 49

Wells Fargo *v.* Taylor, 254 U. S. 175 (1920) 71

West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 (1937) 42

PAGE

White Motor Company v. Littleton, 124 F. (2d) 92 (C. C. A. 5th, 1941) . . 86
Williams v. General Mills, 39 F. Supp. 849 (N. D. Ohio 1941) 60
Williams v. Jacksonville Terminal Co., 35 F. Supp. 267 (D. C. Fla. 1940), affirmed on other grounds, 118 F. (2d) 324, affirmed by this Court Mar. 2, 1942, 86 L. Ed. Adv. Ops. 598 74
Womack v. Consolidated Timber Co., F. Supp. , 5 W. & H. Rep. 10 (D. Ore., 1941) 93
Wood v. Central Sand & Gravel Co., 33 F. Supp. 40 (W. D. Tenn. 1940) 48, 60, 86
Yazoo and M. V. R. C. Co. v. Thomas, 132 U. S. 174 (1889) 19

STATUTES:

Emergency Relief Appropriation Act, Fiscal Year 1941, Sec. 3 (c), c. 432, Public Resolution No. 88, 76th Congress 23
Fair Labor Standards Act, June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Sec. 201 *et seq.* 3, 29, 64, 71, 72, 95-97
Sec. 2 . . . . . 18, 19, 20, 24
(a) 3, 17
(b) 3, 17
Sec. 3
(b) 3
(h) 4
(i) 52
(j) 50, 52, 66
Sec. 5 . . . . . 4, 20, 22, 23, 24, 30, 33, 40
(a) 20
(e) 23
Sec. 6 . . . . . 2, 4, 17, 19-24, 28, 30, 33, 37, 38-41, 66
(4) 21
Sec. 7 . . . . . 4, 17, 19, 21-24, 28, 33, 37-41, 48, 66
Sec. 8 . . . . . 3, 4, 20, 21, 22, 23, 27, 28, 30, 33
(a) 19, 20, 23, 24
Sec. 11 . . . . . 25, 26
(a) 25, 26, 30
(c) 27, 30
Sec. 13 . . . . . 4, 79
(a) (1) 80, 92
(a) (2) 2, 4, 8, 75, 76, 79, 80, 85, 90-93
Sec. 15 5
(a) (1) 94
(a) (2) 5
Sec. 16 (b) 9
Sec. 17 5

PAGE

Federal Employer's Liability Act, Apr. 22, 1908, 35 Stat. 65, 45 U. S. C. A. Sec. 51, *et seq.*, amended, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 71

Federal Trade Commission Act, July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Sec. 1, *et seq.* 70

Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, c. 229, 43 Stat. 936 2

Sherman Act, Sept. 26, 1914, 26 Stat. 209, 15 U. S. C. A. Sec. 41, *et seq.* ... 70

National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. A. Sec. 151, *et seq.* 12, 42, 43, 58, 70, 71, 96, 97

COMMITTEE REPORTS:

75th Congress, 1st Session

Sen. Rep. No. 884, Calendar No. 905 ..... 15, 31, 73, 81, 82

75th Congress, 3rd Session

Conference Report, to accompany S. 2475, H. R. Rep. No. 2738 .. 33, 36, 85

DEBATES:

75th Congress, 1st Session

81 Cong. Rec. p. 7648 ..... 31, 82, 83

75th Congress, 3rd Session

83 Cong. Rec.

pp. 7301–2 41

p. 7334 84

p. 7384 84

p. 7394 85

p. 7412 85

pp. 7437–38 84

pp. 9158–62 33

p. 9164 ..... 33, 34

pp. 9166–9175 34

p. 9166 34

p. 9167 34

p. 9168 ..... 35, 36, 55, 56

p. 9169 34

p. 9170 34

p. 9172 34

p. 9173 84

p. 9257 80

p. 9260 38-39

PAGE

DRAFT BILLS:

H. R. 7200 (original bill introduced in House) 57, 83

S. 2475 (original bill introduced in Senate) 57, 83

S. 2475 (as passed by Senate, July 31, 1937) introduced in Senate July 8, 1937, 75th Cong., 1st Session, Calendar No. 905 ..... 18, 22, 26, 28-32, 37-40, 56, 57, 83

S. 2475 (as passed by House May 24, 1938) introduced in House on April 21, 1938, 75th Cong., 3rd Session, Union Calendar No. 804 (Third House Committee Bill) 18, 22, 26, 28-30, 32, 37-40, 57, 84

HEARINGS:

Joint Hearings (June 2-22, 1937) on S. 2475 and H. R. 7200, 75th Congress, 1st Session 40, 43-44, 73, 81, 82

PUBLICATIONS OF THE ADMINISTRATOR:

Interpretative Bulletin No. 4 ..... 20, 50, 92

Interpretative Bulletin No. 5 20

Interpretative Bulletin No. 6 ..... 78, 87, 88

Release R-139 15

Brief in Circuit Court of Appeals below 23, 26, 30, 38, 50, 53, 60, 66, 69, 73, 74, 86-88, 90, 98

Brief in District Court below 19, 30, 87, 90

OTHER AUTHORITIES:

Forsythe, *Legislative History of the Fair Labor Standards Act* (1939) 6 Law & Contemp. Problems 464 40

Veblen, *The Theory of Business Enterprise* 50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. 910.

A. B. Kirschbaum Company, a Pennsylvania corporation,
Petitioner,

v.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R., pp. 175-180), is reported in 38 F. Supp. 204. The opinion of the Circuit Court of Appeals for the Third Circuit (R., pp. 213-23), is reported in 124 F. (2d) 567.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit, which Petitioner seeks to have reviewed, was filed December 17, 1941 (R., p. 213).

The petition for a writ of *certiorari* was filed on January 29, 1942, and was granted on March 2, 1942 (R., p. 224).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTIONS PRESENTED.

1. Are the employees of an employer who is neither engaged in interstate commerce nor in the production of goods for interstate commerce, covered by the Fair Labor Standards Act?

2. Are the maintenance and service employees of the owner of a loft building whose only business is the rental, operation and maintenance of such building in Philadelphia, engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, merely because some of the tenants of such building are engaged in the production of goods for interstate commerce?

3. Are the elevator operators of the owner of such a loft building directly engaged in interstate commerce?

4. Are the foregoing employees exempt from the wage and hour provisions of the Fair Labor Standards Act under Section 13 (a) (2) which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce?

5. If the Fair Labor Standards Act is held applicable to the foregoing employees, does it contravene the Tenth Amendment to the Constitution?

STATUTE INVOLVED.

The statute involved, known as the Fair Labor Standards Act (hereinafter called the "Act"), approved June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. A., Sec. 201 *et seq.*, is printed in the Appendix, *infra*, pages 101-121. It became effective October 24, 1938.

Section 2 (a) states that Congress finds that "the existence, in industries engaged in [interstate] commerce[1] or in the production of goods for [interstate] commerce," of sub-standard labor conditions, causes, *inter alia*, such commerce and the instrumentalities thereof to be used to spread and perpetuate such sub-standard labor conditions among the workers of the several States.

Congress thereupon declared in Section 2 (b) of the Act that it was the intention of the Act to eliminate such conditions in such industries (*i. e.*, in industries engaged in commerce or in the production of goods therefor), through the exercise of Congressional power over interstate commerce.

Section 6 prescribes the minimum wages which must be paid by every employer covered by the Act to each of his employees who is engaged "in commerce or in the production of goods for commerce". During the first year after the effective date of the Act such wages are fixed at not less than twenty-five cents an hour; during the next six years from such date, not less than thirty cents an hour; and after the expiration of seven years from such date, not less than forty cents an hour or the rate prescribed by the Administrator of the Act in an order issued under Section 8 of the Act and applicable to the interstate industry in which the employer is engaged. In addition, Section 6 also provides that at no time after the effective date of the Act can any em-

[1] The term "commerce" is defined in Section 3 (b) of the Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Accordingly whenever used herein it should be given the meaning attributed to it in the Act, *viz.*, interstate or foreign commerce, unless otherwise qualified.

ployer pay his aforesaid employees less than the rate (not in excess of 40 cents an hour) which may be prescribed by the Administrator in an order issued under Section 8 for the particular interstate industry in which the employer is engaged.

Section 5 provides that the Administrator shall as soon as practicable appoint an "industry committee for each industry engaged in commerce or in the production of goods for commerce", while Section 8 provides that the Administrator shall from time to time convene the industry committee for each such industry which shall "recommend the minimum rate or rates of wages to be paid under Section 6 by employers engaged in commerce or in the production of goods for commerce" to the end that the policy of the Act may be carried out by reaching "*the objective of a universal minimum wage of forty cents an hour in each industry engaged in commerce or in the production of goods for commerce*". Section 8 further sets forth the procedure whereby the wage recommendations of the various industry committees shall become effective, while Section 3 (h) defines "industry" as a "trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."

Section 7 prescribes maximum hours of labor in excess of which no employer covered by the Act may employ any of his employees who is engaged in commerce or in the production of goods for commerce unless the employee is paid for hours worked in excess of the stated maximum at a rate not less than one and one-half times the regular rate at which he is employed. During the first year from the effective date of the Act the maximum provided is forty-four hours per week; during the second year from such date, forty-two hours; and after the expiration of the second year from such date, forty hours.

Section 13 provides certain exemptions from the coverage of the Act, one of which (Section 13(a)(2)), is that the provisions of Section 6 relating to wages and Section

7 relating to overtime shall not apply with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *."

Section 15 (a) (2) makes it unlawful for any person to violate any of the provisions of Sections 6 or 7; and Section 17 gives to the District Courts of the United States jurisdiction, for cause shown, to restrain violations of Section 15.

STATEMENT.

The Petitioner, A. B. Kirschbaum Company, owns a six-story loft building in Philadelphia (R., pp. 3, 175). Its sole activity is to operate the building as a landlord, leasing space therein to any person desiring it (R., p. 166). Although certain of its tenants are engaged in the production of goods for interstate commerce, Petitioner does no manufacturing whatsoever (R., p. 21), and has no interest in the manufacturing or other activities of any of its tenants (R., pp. 166-167, 175). In fact the Petitioner has no business or source of revenue other than that which is connected with its ownership and leasing of its building (R., p. 176).

In operating the building, it employs a cashier who is also bookkeeper (R., pp. 15-16), and a superintendent who is also chief engineer (R., p. 73), neither of whom are involved in this proceeding (R., p. 175). In addition it employs a staff of building service employees consisting of three elevator operators, two watchmen, three firemen, one engineer, a carpenter and a carpenter's helper, and a porter or cleaner (R., p. 175).

The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. The watchmen pass through the building, closing windows, putting out lights, guarding against fires, etc. The engineer supervises the operation of the boilers which produce steam to operate the various pumps in the

building; to heat the building; to operate the generator which generates direct electric current used to light the portions of the building used in common by all tenants and which is also used by two of the tenants; and it is also used by some of the tenants in their manufacturing operations. In addition the engineer keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps when the engineer is called to another part of the building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, staircases, etc. (R., pp. 175-176).

In general it may be said that the Petitioner through the above listed employees, heats the building, keeps it in repair, furnishes steam and direct electric current to those of its tenants who desire it, cleans those portions of the building which are not leased, and provides means of ingress and egress for its tenants, their employees and property being shipped to and by them.

None of the Petitioner's employees produce, manufactures, handles, processes, or in any other manner works on or touches for the purpose of production any goods produced by any of the tenants. The goods transported in the elevators operated by certain of said employees are always in the custody of the representatives of the tenants, or their employees, or of employees of persons whom the tenants have engaged to transport the goods, or of the employees of carriers from whom they are receiving goods (R., pp. 37, 47, 56, 57, 83, 85, 99, 100, 109, 110, 115, 120, 121, 129, 135, 138, 149, 158, 159, 163).

On March 14, 1940, Philip B. Fleming, as the then Administrator of the Wage and Hour Division, United States Department of Labor, contending that all of the foregoing building service employees of the Petitioner are covered by the Act, filed his complaint, and thereafter on April 19, 1940, filed his amended complaint (R., pp. 3-7), alleging that the Petitioner had violated the Act in that it had not paid its employees the minimum

wages provided for, in Section 6, and had worked them in excess of the hours provided in Section 7 without the payment of overtime as therein provided, and prayed for an injunction restraining future violations. The basis of the Administrator's contention was that since the Petitioner's employees were engaged in the servicing and maintenance of a building, space in which was rented to tenants engaged in the production of goods for interstate commerce, such employees were themselves engaged in the production of goods for interstate commerce and thus covered by the Act in view of the provisions of Section (3) (j) which provides that an employee shall be deemed to have engaged in the production of goods for interstate commerce if he was employed "in any process or occupation necessary to the production thereof." In addition the Administrator asserted that the Petitioner's elevator operators were also directly engaged in interstate commerce.

On April 26, 1940, the Petitioner filed its Answer wherein it admitted that it did not conform to the requirements of Sections 6 and 7 of the Act with respect to certain of its aforesaid employees (Answer, pars. VII, VIII, R., p. 12), but asserted *inter alia*, first, that its employees did not come within the provisions of the Act; second, that in any event they were specifically exempt under the provisions of Section 13 thereof; and third, that the Act could not constitutionally be applied to them (R., pp. 13, 14).

After trial, the District Court, in an opinion by Kirkpatrick, *J.*, filed April 2, 1941, granted judgment for the Administrator (R., pp. 175-180), which judgment was entered on April 28, 1941 (R., pp. 180-182).

On the same day the Petitioner filed its notice of appeal to the Circuit Court of Appeals for the Third Circuit, together with bond for costs sur appeal. At the same time the District Court, on motion of the Petitioner, entered its order suspending the injunction pending appeal (R., p. 185).

After argument on appeal, the Circuit Court, in an opinion filed December 17, 1941, affirmed the judgment of the District Court (R., pp. 213-23).

On or about December 12, 1941, Philip B. Fleming resigned from the Office of Administrator of the Wage and Hour Division, United States Department of Labor, and on March 7, 1942, L. Metcalfe Walling took the oath of office as and assumed the duties of such Administrator following confirmation by the Senate of the United States of his nomination for such office by the President.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Third Circuit erred—

(1) In holding that the Act covers employees of an employer who is engaged neither in interstate commerce nor in the production of goods for such commerce.

(2) In holding that the building service employees of the Petitioner are engaged in the production of goods for interstate commerce within the meaning of the Act.

(3) In holding that the elevator operators of the Petitioner are directly engaged in interstate commerce.

(4) In holding that the building service employees of the Petitioner are not exempt from the wage and hour provisions of the Act by Section 13 (a) (2), which exempts employees of service establishments the greater part of whose servicing is in intrastate commerce.

(5) In holding that the Act, when applied to the building service employees of the Petitioner, does not violate the Tenth Amendment to the Constitution of the United States.

(6) In holding that the building service employees of the Petitioner are covered by the Act and in affirming the judgment of the District Court enjoining the Petitioner from violations of the Act.

ARGUMENT.

I

PRELIMINARY STATEMENT.

(1) The principles relied on by the Petitioner and the judicial recognition accorded them.

The record in this case clearly establishes that the *employer* is engaged, *not* in interstate commerce nor in production therefor, but solely in the operation of a loft building in Philadelphia, leasing space to any person desiring it, and that its *employees*, collectively considered, maintain and operate the building for it as a going concern.[1] That Congress never intended, in passing the Act, to regulate the wages and hours of employees rendering services of that type to such a wholly local and intrastate enterprise is supported by all of the decisions on the question, with the exception of the decision in the present case and that in *Fleming* v. *Arsenal Building Corporation*,[2] which is also now before this Court for review.

The question of the application of the Act under these circumstances was first decided in 1940 by the Supreme Court of New York, Appellate Division,[3] in *Killingbeck & Riddoch* v. *Garment Center Capital, Inc.*, 259 App. Div. 691, 20 N. Y. Supp. (2d) 521. There suit was brought by a watchman and a carpenter formerly employed by the

[1] The District Court in its opinion stated: "It may be conceded that renting buildings—the industry in which this employer is engaged—is not an 'industry engaged in commerce or in the production of goods for commerce'" (R., p. 178).

[2] 125 F. (2d) 278 (C. C. A. 3d., Dec. 30, 1941).

[3] The question arises not only in actions instituted by the Wage and Hour Division of the Department of Labor for enforcement of the Act, as in the present case, but also in suits by employees claiming that they are entitled to the compensation provided for in the Act. Section 16 (b) thereof gives employees a right of action for the amount of their unpaid minimum wages and overtime compensation and an additional amount as liquidated damages, which action may be brought "in any court of competent jurisdiction." Many of the cases hereinafter referred to have therefore been decided by state courts.

defendant, the operator of a loft building, space in which was leased to tenants engaged in the production of goods for interstate commerce, to recover overtime payments and liquidated damages to which plaintiffs claimed to be entitled under the Act by reason of the fact that as employees of such building they were performing services "necessary to the production" by the tenants of goods for interstate commerce. The facts with reference to the activities of the employees in question, the nature of the business conducted by the tenants, and the relation of the employees to the tenants, were substantially the same as those involved in the present case. The contention of the plaintiffs that the coverage of the Act extended to them was rejected and judgment entered in favor of the building owner.

Again in *Merryfield, et al.* v. *F. M. Hoyt Shoe Corporation, et al.*, 41 F. Supp. 794, decided by the United States District Court for the District of New Hampshire on November 6, 1941, suit was instituted by building service employees against the Shoe Corporation and the Reconstruction Finance Corporation as the owners of a loft building in which they had been employed, to recover the compensation to which they claimed they were entitled under the Act. The Shoe Corporation had formerly been engaged in manufacturing, but in 1936 it ceased such activity and rented its factory buildings to other companies in no way connected with it, which companies as tenants engaged in the production of goods for interstate commerce. The Reconstruction Finance Corporation thereafter foreclosed the mortgage on the factory buildings and continued to rent and operate them in the same manner as theretofore. This suit was likewise dismissed on the ground that the plaintiffs were not covered by the Act.

Cecil, et al. v. *Gradison, et al.*,[4] decided by the Court

[4] So far as we have been able to determine the decision has not as yet been officially reported. However, a complete copy of the opinion is printed in the Appendix to the Petitioner's Petition for Writ of Certiorari, pp. 53-58, and it also appears in 4 W. & H. Rep. 698.

of Appeals for the First Appellate District of Ohio on November 17, 1941, was an action begun by building service employees employed in a building owned by the defendants and in part of which they conducted a banking business. The plaintiffs handled shipments of various kinds and descriptions to persons in other states and acted as freight and passenger elevator operators, janitor and engineer. Here again the plaintiffs sued on the theory that they were covered by the Act and entitled to overtime compensation under the provisions thereof. But the action of the trial court in sustaining a demurrer to their petition was sustained.

In *Robinson* v. *Massachusetts Mutual Life Insurance Company*,[5] 158 S. W. (2d) 441, decided by the Supreme Court of Tennessee on November 29, 1941, suit was brought by building service employees employed by defendant as the owner and operator of three office buildings, ninety per cent. of the space in which was leased to the Tennessee Valley Authority, to recover the compensation alleged to be due them under the Act. The judgment of the lower Court in favor of the building owner and operator was affirmed by the State Supreme Court.

The most recent case on the question, which is in complete accord with the foregoing decisions, is that of *Johnson* v. *Filstow, Inc.*,[6] where suit brought against a landlord by a janitor employed in a building leased in part to interstate tenants, was dismissed.

The above cases, representing the majority view (and that asserted by the Petitioner), have been decided in every instance by the application of one or both of two basic principles: the first, that the Act does not apply to employees of an employer who is himself neither engaged in interstate commerce nor in the production of goods therefor; and the second, that building service employees are not engaged in the production of goods for interstate commerce within the meaning of the Act since their services do not directly contribute to such production.

[5] A complete copy of the opinion is printed in the Appendix to Petitioner's Petition for Writ of Certiorari, pp. 58-65, and it also appears in 4 W. & H. Rep. 725.

[6] 5 W. & H. Rep. 286, decided by the United States District Court for the Southern District of Florida on March 30, 1942.

In the discussion that follows it will be shown that the provisions of the Act itself as well as its legislative history requires the recognition of *both* those basic principles, either of which is sufficient to exclude the Petitioner from the scope of the Act. Even in the absence of such specific evidence that the foregoing principles are conclusions required by the language of the Act and its legislative history, there is compelling reason to avoid the broad construction of the Act advocated by the Administrator.

(2) The constitutional doubts attending the Administrator's position.

In the first place, the application of the Act to Petitioner's employees would go beyond the limits of Congressional power under the commerce clause. And where a statute is open to two constructions, one of which would raise a grave and doubtful constitutional question, the construction avoiding such question will be adopted.[1]

The precise limits of Congressional power under the commerce clause can of course only be determined by this Court as each doubtful case arises. But, as we shall show in more detail hereafter, the cases decided by this Court that have gone farthest in sustaining Congressional power have dealt with activities far more intimately related to interstate commerce itself than those of Petitioner's employees. *Cf., United States* v. *Darby Lumber Co.*, 312 U. S. 100 (1941), sustaining the Act as applied to the facts there presented; and cases approving particular applications of the National Labor Relations Act: *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937); *Santa Cruz Packing Company* v. *National Labor Relations Board*, 303 U. S. 453 (1938); *Consolidated Edison Company of New York, Inc., et al.*, v. *National Labor Relations Board*, 305 U. S. 197 (1938); and *National Labor Relations Board* v. *Benjamin Fainblatt, et al.*, 306 U. S. 601 (1939).

[1] *Missouri Pacific Railroad* v. *Boone*, 270 U. S. 466, 472 (1926); *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 307 (1924); *United States* v. *Delaware and Hudson Company*, 213 U. S. 366, 408 (1909).

In all those cases this Court emphasized the necessity that the activity in question must have a "close and substantial" effect upon interstate commerce in order to bring it within Congressional power. Conversely, as this Court stated in the *Santa Cruz* case,[2] the "subject of federal power, is still 'commerce'." Congress may do what is "necessary and proper" to regulate commerce, but there is no justification for substituting the word "production" for the word "commerce" in the constitutional phrase.

(3) The undesirability of extending extraordinary Federal control in the absence of a clear Congressional intent to do so.

In the second place, even where Congressional power is reasonably clear this Court has refused to interpret federal statutes in such a way as to exhaust Congress' constitutional power in the absence of a clearly expressed intent to that effect. Congress may of course regulate interstate commerce. And where "necessary and proper" to the full and successful regulation of such commerce, Congress has been permitted to regulate activities which, considered separately, would be considered intrastate and not to come within the federal power.

To exercise this extraordinary power however, Congress must speak clearly. It seems true that recent decisions of this Court have permitted Congress greater latitude than formerly in the exercise of its power to regulate interstate commerce. But as a corollary to this wider power has come a new responsibility, the responsibility of stating when it wishes to use this wider power. The control of local activities by the Federal government is a delicate matter and the intention to exercise it will not lightly be imputed to Congress. In *Apex Hosiery Company* v. *William Leader*, 310 U. S. 469 (1940), this Court stated (p. 513):

[2] 303 U. S. 453, 466-67 (1938).

"The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."

Likewise, in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), an attempt was made to apply the doctrine of the *Shreveport* case[1] to justify orders issued by the Federal Trade Commission against persons whose activities unquestionably "affected" interstate commerce in the constitutional sense. Petitioner regards as significant the language of the Court in restraining such an attempt:

"When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See, for example, National Labor Relations Act • • • Bituminous Coal Act • • • Federal Employers' Liability Act • • • as amended • • •.

"The construction • • • urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. • • • An inroad upon local conditions and local standards of such far reaching importance as is involved here, ought to await a clearer mandate from Congress." (312 U. S. at p. 351 and pp. 354-355.)

The Act here in question presents an even stronger case for the application of the doctrine of the *Bunte* decision. For here, as will be shown, the final draft of the Act

[1] *Houston, East and West Texas Railway Co.* v. *United States*, 234 U. S. 342 (1914).

was chosen in preference to earlier drafts which had provided for coverage of activity that should be found to *affect* employment conditions in interstate occupations.

One last general observation should be made. The Administrator and some lower courts believe that an abnormally broad construction of the Act is justified because the Act is "remedial" or "humane" in purpose.

But the issue is not one of humanity versus inhumanity, nor of wage-hour standards versus no wage-hour standards. Such protective legislation is a matter to which the states have long been attentive. They have in fact shown the way to the Federal government. Federal intercession was considered necessary in the realm of industries selling in and producing for interstate commerce, as to which individual states would be unable effectively to deal. The true issue then is whether wage and hour standards will be regulated by Federal and state governments, each covering its normal sphere, or whether the Federal government shall be deemed to have taken to itself an exceptionally broad and questionable sphere of control.

From start to finish the record of the deliberations of Congress over the Fair Labor Standards Act evidences a desire not to extend Federal control over those matters to which the President, in his message to Congress, which initiated consideration of wage and hour legislation in interstate industry,[2] referred as being essentially and primarily the responsibility of the states and with which "the State may effectively deal without fear of unneighborly competition from sister States."

The first Administrator of the Act, who was thoroughly familiar with Congressional intention, recognized this when he made the following statement:[3]

[2] See President's message to Congress quoted in the Report of the Senate Committee on Education and Labor to accompany S. 2475, 75th Cong., 1st Sess., Senate Cal. No. 905, Report No. 884.

[3] Wage and Hour Administrator's Release R-139, statement made Dec. 29, 1938, only six months after the passage of the Act.

"The area of Federal regulation is necessarily limited to employments which have some demonstrated connection with interstate commerce."

"Moreover, the Fair Labor Standards Act as it now stands uses sparingly the commerce power of the federal government. Its provisions are applicable only to employees engaged in interstate commerce or in the production of goods for interstate commerce. This use of the commerce power may be contrasted with that employed by the National Labor Relations Act, where all productive activities *affecting* interstate commerce are brought within the statute." (Italics supplied.)

II

PETITIONER'S MAINTENANCE AND SERVICE EMPLOYEES, BEING EMPLOYED BY THE OWNER OF A LOFT BUILDING WHOSE ONLY BUSINESS IS THE RENTAL, OPERATION AND MAINTENANCE OF SUCH BUILDING IN PHILADELPHIA, ARE NOT EMPLOYEES OF AN EMPLOYER ENGAGED IN INTERSTATE COMMERCE OR IN THE PRODUCTION OF GOODS THEREFOR AND CONSEQUENTLY ARE NOT COVERED BY THE ACT.

The Act and its legislative history clearly establish that Congress intended the Act to apply only within the broad framework of industries engaged in interstate commerce or in the production of tangible, physical goods for such commerce. Before an employee can be brought within the scope of the Act, therefore, it must appear, first, that his employer is engaged in interstate commerce or in the production of goods therefor in an industry so engaged, and, second, that the employee is individually engaged in such activity. Concededly Congress was con-

cerned with the interstate character of the activities of the individual employee so that, depending upon the circumstances in each case, one employee of an employer might be covered by the Act and another not. But it is equally evident that Congress intended that the employer of such employee must also either be engaged in interstate commerce or in the production of goods therefor.

Application of this criterion to the employees of the Petitioner excludes each of them from the coverage of the Act regardless of whether the particular employee considered is engaged in operating elevators, acting as a watchman, or generating steam in the boiler room. For this reason the Administrator's case must fail.

The existence of the initial requirement that the Act may be applied to a particular employee only if his employer is engaged in what may be termed an "interstate industry" is revealed by an examination of the language of related sections of the Act and their legislative history; of the legislative history of Sections 6 and 7; and of the legislative history of the Act as a whole.

(1) Related Sections of the Act and their legislative history.

(a) *Section 2 of the Act and its legislative history.*

Section 2(a) of the Act provides that:

> "Congress hereby finds that the existence, *in industries* engaged in [interstate] commerce or in the production of goods for [interstate] commerce, of [substandard] labor conditions • • •" (Italics supplied)

has adverse effects upon interstate commerce.

Section 2(b) states:

> "It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the

conditions above referred to in *such industries* • • •." (Italics supplied.)

It is noteworthy that Section 2 did not appear in the Act unchanged from the language employed in the House and Senate bills, but rather that as it now stands it represents a conscious change by the Conference Committee from the word *occupations* employed in both the predecessor bills to the word *industries* as contained in the Act. Thus the Senate Bill, passed by the Senate on July 31, 1937,[1] declared in that section corresponding to Section 2 of the Act that:

> "The employment of workers under sub-standard labor conditions in *occupations* in interstate commerce, in the production of goods for interstate commerce, or otherwise directly affecting interstate commerce" (Italics supplied)

has adverse effects upon interstate commerce the elimination of which "in occupations in and directly affecting interstate commerce" required Congressional action. Likewise, the Third House Committee Bill, passed by the House on May 24, 1938,[2] contained a finding and declaration of policy almost identical with that contained in the Senate Bill. Nevertheless, in this respect in which the two bills agreed, the Conference Committee Bill, which finally became law, changed the language of the previous sections from a declaration that sub-standard labor conditions should be eliminated from *occupations* in interstate commerce to a similar declaration with regard to *industries* engaged in such commerce or in the production of goods therefor.

[1] S. 2475, 75th Cong., 1st Sess., Calendar No. 905, reported by the Senate Committee on Education and Labor, introduced in the Senate July 8, 1937, and amended from the floor.

[2] S. 2475, 75th Cong., 3rd Sess., Union Calendar No. 804, reported by the House Committee on Labor, introduced in the House on April 21, 1938, and amended from the floor.

Respondent has seized upon Section 6 of the Act, which prescribes the minimum wages to be paid by "every employer" to those of his employees engaged in interstate commerce or production of goods therefor, and Section 7, which provides that "no employer" shall employ any such employees longer than a certain number of hours per week without overtime compensation, as indicating that Congress did not intend to provide the framework of interstate industries as the ultimate basis of coverage under the Act. This interpretation has likewise been adopted by the Circuit Court of Appeals in its opinion in the instant case. But it is clear that the general language with regard to employers in those Sections must be viewed initially against the proper background which Congress laid down in Section 2, and when this is done it results that the employers referred to in those sections are in fact those engaged in interstate industries. Such a construction was adopted in the case of *Cecil* v. *Gradison, supra,* where the Court stated:

> "Accordingly, the language of Section 206, 29 U. S. C. A., that 'Every employer shall pay to each of his employees engaged in commerce or in the production of goods for commerce wages at the following rates' and the provision in Section 207 that 'No employer shall—employ any of his employees who is engaged in commerce or in the production of goods for commerce' must be limited by the declared purpose in Section 202 and the definition of terms in Section 203 * * *."[3]

[3] In his Reply Brief in the District Court (p. 2), the Administrator asserted that resort by the Petitioner to Section 2 to show the objectives of the Act in an effort to explain the application of Sections 6 and 7, indicated a weakness of Petitioner's contention and in that connection the Administrator cited *Yazoo and M. V. R. C. Co.* v. *Thomas,* 132 U. S. 174, 188 (1889), as authority for the principle that the necessity of resorting to the preamble of an act to assist in determining the true intent and meaning of the legislature is in itself fatal to the claim set up. Although, as is shown in this Brief, the Petitioner refers to Section 2 merely as indicating the objective of the Act *as it is specifically declared and stated in Section 8 (a),* it seems

(b) *Sections 5 and 8 of the Act and their legislative history.*

In addition to thus indicating in Section 2 that the exercise of its power was to be directed only to the correction and elimination of sub-standard labor conditions "*in industries engaged in commerce or in the production of goods for commerce,*" Congress explicitly stated in Section 8 (a) that the objective of the Act was the attainment of a universal minimum wage of forty cents an hour "*in each industry engaged in commerce or in the production of goods for commerce.*" And in order to carry out such objective "as rapidly as is economically feasible without substantially curtailing employment," Section 8 (a) further provides that the Administrator shall convene "*for each such industry*" the industry committee the appointment of which is provided for in Section 5. The function of the industry committees is to recommend "the minimum rate or rates of wages to be paid under section 6 *by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.*"

Thus Section 5(a) provides that:

> "The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in [interstate] commerce or in the production of goods for [interstate] commerce,"

while Section 8(a) states:

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appropriate to note that this Court, not only in the cited case but in subsequent cases including *Price* v. *Forrest*, 173 U. S. 410 (1899), stated that the preamble may properly be referred to to assist in ascertaining the intent and meaning of a statute susceptible of different constructions. *Cf., Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938).

In this connection it might not be amiss to note that the Administrator himself in Interpretative Bulletin No. 1, issued September 22, 1938, and in Interpretative Bulletin No. 5, reissued in revised form November 27, 1939 (W. & H. Manual, 1941 Edition, pp. 27, 32), refers to Section 2 of the Act to assist in ascertaining the intent of Congress.

> "With a view of carrying out the policy of this Act by reaching as rapidly as is economically feasible without substantially curtailing employment, the objective of a minimum wage of 40 cents an hour in each industry engaged in [interstate] commerce or in the production of goods for [interstate] commerce, the Administrator shall from time to time convene the industry committee for each such industry and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under Section 6 by employers engaged in [interstate] commerce or in the production of goods for [interstate] commerce in such industry or classification therein."

That the scope of these Sections and of Sections 6 and 7 is identical is shown by the fact that each pair of Sections is internally linked by cross references to the other in such a way as to leave no doubt of the intention that they should function as a unit in fixing minimum wages. Thus Section 6, setting forth certain specified minimum wages to be paid by "every employer," provides in sub-section (4) that notwithstanding the minima previously stated, *every employer* must pay:

> "(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, * * *."

And in the same way Section 8 provides that the industry committees shall recommend minimum rates to be paid *under Section 6* by employers engaged in interstate commerce or in the production of goods therefor. This in itself constitutes a direct statement by Congress of the type of employer intended by it to fall within the scope of Sections 6 and 7.[4]

[4] Since Sections 6 and 7 employ an identity of language with regard to employers, their scope is obviously identical and coverage under them must be the same.

Further evidence that Sections 5 and 8 are co-extensive with Sections 6 and 7 lies in the histories of the respective Sections. The bill which passed the Senate on July 31, 1937,[5] in recognition of the existence of geographical and economic diversities throughout the country, did not set up specific statutory minimum wages or maximum hours, but instead provided for the creation of a Labor Standards Board which was directed to declare minimum wages and maximum work weeks for "occupations" after considering various relevant factors.

On the other hand, the Bill which passed the House on May 24, 1938,[6] stipulated a single inflexible minimum wage and maximum work week so that no such intermediate body was necessary.

The Conference Committee Bill compromised between the approach of the House and that of the Senate. The rigid minimum of wages and hours of the House Bill was retained in a milder form in Sections 6 and 7 of the Act, so that over a number of years the desirable ultimate minimum standards would be achieved by a series of specified gradual increases. At the same time it was believed that certain industries would be able to progress more quickly toward the desired goal than others and would therefore be able to contribute more effectively to the raising of minimum standards without substantially curtailing employment. For this reason Sections 5 and 8 were inserted, obviously drawn from the flexible wage provisions of the Senate Bill, in order to provide for every industry a machinery whereby such variations might take place upon the recommendation of industry committees performing a function similar to the Senate's Labor Standards Board and Advisory Committees. Since

[5] S. 2475, 75th Cong., 1st Sess., Calendar No. 905, reported by the Senate Committee on Education and Labor, introduced in the Senate July 8, 1937, and amended from the floor.

[6] S. 2475, 75th Cong., 3rd Sess., Union Calendar No. 804, reported by the House Committee on Labor, introduced in the House on April 21, 1938, and amended from the floor.

both sets of Sections were intended as methods of solving the same problem and were created to function side by side at the same time, the only reasonable conclusion, in the absence of specific evidence to the contrary, is that they were given the same scope within which to operate.

No such contrary evidence has been produced on behalf of the Administrator. His argument, aside from an attempt to dismiss Sections 5 and 8 as not being "substantive" (evidently because they provide for the utilization of administrative procedure), is based solely[7] upon a misstatement of the purpose of the Act. The objective of the Act is not as the Administrator contends,[8] "the establishment of a forty cent minimum wage rate for each employee" engaged in commerce or in the production of goods for commerce, but the establishment "of a universal minimum wage of forty cents an hour *in each*

[7] That is, except for the Administrator's argument (which the District Court and Circuit Court of Appeals have properly ignored), based upon the amendment of Section 5 of the Act almost exactly two years after passage of the Act, by which sub-section (e) was added thereto. (Emergency Relief Appropriation Act, Fiscal Year 1941, Sec. 3 (c), c. 432, Public Resolution No. 88, 76th Congress.) This sub-section provides for the appointment of an industry committee for Puerto Rico and the Virgin Islands, "to recommend the minimum rate or rates of wages to be paid under Section 6 to all employees * * * engaged in commerce or in the production of goods for commerce * * *." In legislating with respect to the territories, possessions and dependencies of the United States, Congress is, of course, not subject to the same restrictions that are imposed upon it with regard to laws for the United States considered as a political body of states in union. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 323 (1927); *DeLima* v. *Bidwell*, 182 U. S. 1, 196 (1901). Furthermore, it is difficult to see how action by Congress two years after the passage of the Act itself (and in a minor, undiscussed amendment tacked on to an appropriation bill), can overcome explicit evidence of intent at the time of passage of the Act. Far from strengthening his case, the Administrator's resort to this sub-section demonstrates the inconsistency and weakness of his position. On the one hand he argues that Sections 5 and 8 (a), expressly applying only to interstate industry, cannot properly be viewed as indicating the scope of Sections 6 and 7; yet at the same time he attempts to show that because Section 5 (e) is not limited to interstate industries, it must follow that Sections 6 and 7 are likewise not so limited.

[8] Brief of the Administrator in the Circuit Court of Appeals at page 30.

industry engaged in commerce or in the production of goods for commerce.'"[9] (Italics supplied.)

Not only has the Administrator failed to introduce any evidence to overcome the evidence already set forth that Sections 6 and 7 have the same scope as Sections 5 and 8. But there is also in the legislative history of Sections 6 and 7 and of the Act as a whole additional and, we believe, compelling evidence that these sections were coordinate in scope and operation, as will hereafter be shown.[10]

The Circuit Court of Appeals has stated in substance in its opinion that the language of Sections 6 and 7 is clear and that nothing in Sections 2, 5 and 8 of the Act justifies the conclusion that Congress meant anything other than what literally appears in Sections 6 and 7 with regard to employers. But its statements on this point are confined entirely to a mere rephrasing and summarizing of the language which already appears in Sections 2, 5, 6, 7 and 8, and set forth no analysis or reasons as the basis of its conclusion. A reading of the full opinion can leave no doubt that the motivating factor for these statements is that Sections 6 and 7 lack on their face words specifying a particular type or types of employers. This construction ignores, however, the change in Section 2 by the Conference Committee to express the intent of Congress that the Act apply on an industry basis; the internal cross-references inserted in Sections 6 and 8; and the reasons for the insertion of Sections 5 and 8.

The result reached by ignoring these factors is unreasonable and at variance with the policy of the legislation viewed as a whole. The policy of the Act is plainly stated in Sections 2 and 8, and to give to a few words of general connotation appearing therein a construction which is broader than that policy constitutes both a

[9] Section 8 (a) of the Act.

[10] Brief, pp. 28-44, *infra*.

refusal to follow the course indicated by this Court and a settled canon of statutory construction. As this Court has stated in *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543-544, 60 S. Ct. 1059 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

(c) *Section 11 of the Act and its legislative history.*

Still further evidence that the Act was intended by Congress to apply only within the framework of interstate industries is supplied by Section 11. Thus Section 11(a) provides that:

> "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment *in any industry subject to this Act*, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *." (Italics supplied.)

The genesis of this section is found in the House Bill, which the Administrator has admitted predicated coverage upon the nature of the *employer's* business.[11] Section 9(a) of that bill authorized the Secretary of Labor, in determining whether there had been any violation thereof, to investigate practices of employment "in any *industry* subject to this Act." The Senate bill, on the other hand, authorized the Labor Standards Board therein provided for to investigate practices of employment "in any *occupation* subject to this Act,"[12] in order to determine the existence of violations of the bill. It can only be concluded that the Conference Committee, when it incorporated the House bill version of this section almost verbatim as Section 11 of the Conference Committee bill, intended to make the Conference bill, which became the Act without change, applicable only to employers in interstate industry. There can be no doubt that the enforcement provisions of the Act had of necessity to be as broad in their coverage as the scope of the substantive provisions. Otherwise Congress would be deliberately passing a statute in which the means of enforcement were made incomplete and ineffective by its own action.

Section 11(a) of the Act has, since the argument of the present case in the Circuit Court of Appeals, been judicially construed to refer throughout only to employers engaged in interstate commerce or in the production of goods therefor. Thus, in *General Tobacco and Grocery Co.* v. *Fleming*, F. (2d) , (C. C. A. 6th, Feb. 5, 1942),[13] the Administrator contended that, while the words "industry subject to this Act" appeared in the first part of the sub-section, there was no such limitation in the second clause dealing with inspections

[11] Administrator's Brief in the Circuit Court of Appeals, at page 33.

[12] Sec. 12(a) of S. 2475 as amended, Calendar No. 905.

[13] So far as we have been able to determine, the decision has not as yet been officially reported. However, a complete copy of the opinion appears in 5 W. & H. Rep. 103.

and therefore the Administrator had investigatory power over all industry, without restriction, to determine whether any person had violated any provision of the Act. To this contention the Court answered:

> "To adopt this strained construction would extend the sweep of his inquisitorial power beyond the apparent intention of Congress, *as evidenced by the repeated limitations of the applicability of the Act to those subject to its provisions.* An Administrator must restrain himself within the bounds of his delegated authority." (Italics supplied.)

Stating, after an analysis of the Act, that "it is obvious that Congress had well in mind the applicability of the Act only to interstate commerce engagements", the Court held that a subpoena issued by the Administrator for the production of books and records could not be enforced prior to the determination of the question whether the employer to whom the subpoena was directed fell within the coverage of the Act, *i. e.*, whether he was engaged in interstate commerce or in the production of goods therefor.

Section 11(c) of the Act provides as follows:

> "*Every employer subject to any provisions of this Act* or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder." (Italics supplied.)

Here again the language "Every employer subject to any provisions of this Act" has been judicially construed

in complete accordance with the contention of Petitioner. Thus, in *General Tobacco and Grocery, Co.* v. *Fleming, supra,* the Court, in referring to Section 11(c) stated:

> "Such employer, to be subject to the coverage of the Act, must be engaged in interstate commerce or in the production of goods for interstate commerce."

(2) The scope of Sections 6 and 7 of the Act as established by the legislative history.

A consideration of the aggregate of certain aspects of the legislative history of the Act, particularly of the action taken by the Conference Committee with regard to the differing bills passed by the Senate and House, makes it clear that the Act was intended to apply only where both the employer and the employee in question met the necessary requirements for coverage, and further explains the present form of the language of Sections 6 and 7, which has been seized upon in isolation by the Administrator as the sole basis for his position.

Certain features of the Senate bill have already been discussed in connection with the treatment of particular sections of the Act and may be summarized as follows:

(i) The bill was directed to the elimination of sub-standard labor conditions in "occupations" in and directly affecting interstate commerce;

(ii) No statutory minimum wages or maximum hours were set up but instead it was provided that the Labor Standards Board should declare particular minimum wages and maximum hours for any such "occupations"; and

(iii) It authorized the Labor Standards Board to investigate, in determining the existence of violations, employment conditions in any "occupation subject to this Act."

With regard to the above features, the House bill has been shown to have been substantially identical with

respect to the first, while with respect to the second and third it differed radically by fixing a single inflexible minimum wage and maximum work week which was not subject to modification and by providing for the investigation of employment practices in industries affecting [interstate] commerce. The House bill applies its minimum wage and maximum work week only with respect to "employers engaged in commerce" in "industries affecting commerce." The Secretary of Labor was charged with the duty of determining, upon application of the criteria set up by the bill, whether a given industry was one "affecting commerce" and until he did so, the fixed wage and hour standards were not applicable. If he so found, they applied automatically with respect to *every* employee employed by "every employer engaged in commerce in any industry affecting commerce".[1]

The bills passed by both chambers were rewritten by the Conference Committee, whose recommendations in the form of a Conference bill were passed by Congress on June 25, 1938.[2]

The Conference Committee made such changes in the two bills as clearly to indicate the applicability of the Act only where both the employer and employee met the requirements as to interstate commerce.

First, as has been shown above, the substantially identical findings and declaration of policy contained in both the House and Senate bills to the effect that sub-standard labor conditions should be eliminated "in *occupations* in interstate commerce," were changed in the Conference agreement to refer only to such conditions "in *industries* engaged in commerce or in the production of goods for commerce." If, as the Administrator contends, the Act contains no "industry" limitation, this action of the Conference Committee in deliberately making the purpose of the Act narrower than the means of carrying it out is incomprehensible.

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[1] S. 2475, as passed by the House, Sections 4, 5(a).

[2] Pub. L. No. 718, 75th Cong., 3rd Sess., 52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*

Second, the rigid scale of wages and hours of the House bill was retained in a milder form and at the same time this rigid wage scale was combined with the flexibility of the Senate bill by providing for the creation of interstate industry committees which had power to investigate and, after consideration of the relevant economic factors, to recommend minimum wages higher than those provided in the rigid scale.

Third, Sections 5 and 8 on the one hand and Section 6 on the other, created to deal with the common problem of minimum wages, were given internal cross-references which indicate that their scope is identical.

Fourth, the provision in the House bill authorizing the Secretary of Labor to investigate practices of employment "in any industry subject to this Act" was retained almost verbatim as Section 11(a) of the Conference bill.

Fifth, Section 11(c), dealing with the keeping of records, was limited to "every employer subject to any provisions of this Act."

The only answer that the Administrator has been able to supply in an attempt to offset the evidence from the legislative history which has been set forth above, has consisted of two assumptions. These are (*a*) that the Senate bill was based on *employee* activity alone without regard to the interstate character of the employer; and (*b*) that this basis of coverage was adopted without change by the Conference Committee, which drafted the Act as finally passed. The Administrator has, as he must, conceded that the House bill covered only the employees of an interstate employer.[3] The Administrator's case falls, therefore, if either of his two assumptions is erroneous. The actual facts show that the first assumption is probably, and the second one certainly, false.[4]

[3] Brief of Administrator in the Circuit Court of Appeals at page 33.

[4] Petitioner has consistently so contended, and has never conceded that even the first assumption is correct. The error of the second assumption seemed to it so clear, however, that the first assumption was not examined in detail in its brief in the Circuit Court of Appeals although it was discussed in its brief in the District Court.

(a) *The Senate bill.*

The recital of conditions to be remedied, that appeared in the main wage and hour section of the Senate bill,[5] directly contradicts the Administrator's theory, as embodied in the first assumption mentioned above. This recital expressly and repeatedly referred to "interstate industries."[6] Thus, Section 4(a) provided:

> "Whereas wages paid *in interstate industries* vary greatly between industries and throughout the Nation, reaching as low as $5. or less per week; and
>
> "Whereas hours of labor *in interstate industries* also vary greatly between industries and throughout the Nation, reaching as high as 84 hours per week; and * * *
>
> "Whereas it is necessary for the development of American commerce and the protection of American workers and their families that substandard wages and hours be eliminated *from interstate industry and business;* * * *." (Italics supplied.)

Moreover, the explanation in the Senate Committee report,[6] which accompanied and explained this bill, emphasized in the clearest terms that there was no intention of covering essentially local employers or business establishments, but only interstate business or industry. The same point was brought home again and again to the members of the Senate by the Chairman of the Committee on Education and Labor.[7]

The only scintilla of evidence upon which the Administrator can rely for his assumption that the Senate bill was based on employee activity without regard to the interstate status of the employer is the fact that the Senate bill, like the original bills, repeatedly refers to "occupations". The word "occupations" appears not only in

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[5] Section 4(a) of S. 2475, as passed by the Senate on July 31, 1937.

[6] Sen. Rep. No. 884, 75th Cong., 1st Sess., July 8, 1937, p. 5.

[7] 81 Cong. Rec., p. 7648. These statements, and that in the Senate Committee Report, are quoted at pp. 82-83, *infra*.

the legislative declaration of policy in Section 1 of the Senate bill but also in one of the main substantive coverage sections.[8]

While perhaps the connotation of the word "occupation" is a reference to employee activity, a careful examination of the Senate bill indicates that the word was also used in that bill as synonymous with the word "industry". Thus, the statutory definition was as follows:

> "SECTION 2. (a) * * *
>
> (5) 'Occupation' means an occupation, industry, trade, or business, or branch thereof or class of work or craft therein, in which persons are gainfully employed."

Moreover, throughout the bill the word "occupation" was used as a generic term comprehending *both* employers and employees. Thus, in Section 9, sub-sections (3) and (4) of the Senate bill, the Labor Standards Board was given power to classify "*employers, employees* and employment *within the occupation* to which such order relates * * *". (Italics supplied.) This bill also provided in Section 11 for the establishment of Advisory Committees to be composed of "*employers and employees*, or organizations thereof, *in such occupation.*" (Italics supplied.)

Thus there is extreme doubt as to the correctness of the Administrator's theory as to the meaning of the Senate bill itself. The theory is based entirely upon the word "occupation" without regard to the manner in which it was used and defined in the Senate bill. The possibility that the word was susceptible of such an interpretation as the Administrator tries to give it may well be the explanation for the fact that it was supplanted in the Act by the word "industry" which appeared in the House bill.

[8] Section 4 of S. 2475, as passed by the Senate on July 31, 1937.

(b) *The Conference Committee bill.*

In any event, the Conference Committee bill clearly rejected the theory now advanced by the Administrator. Statements made on the floor of the Senate by the most authoritative spokesmen, the Senate Conference Committee managers, establish that the Act as finally drafted and passed was intended to apply only to employees who are both employed in an interstate industry and are themselves engaged either in interstate commerce or in the production of goods for interstate commerce.

The formal Conference Report was presented to the Senate on June 14, 1938, by Senator Elbert D. Thomas, Chairman of the Senate Committee and one of the managers of the bill for the Senate.[9] In introducing and explaining the main provisions of the bill, he repeatedly referred to "industries covered by the Act." Moreover, in explaining that *the minimum wage rates fixed in the Act "for all industry producing for interstate commerce"* could be increased (not however to exceed forty cents an hour) when substantial curtailment of employment would not result, he indicated clearly that Sections 6 and 7 were intended to cover a field no broader than Sections 5 and 8. Thus he stated:[10]

> "Having fixed a rudimentary floor for wages for *all industry producing for interstate commerce,* we decided to authorize separate and, when substantial curtailment of employment would not result, higher minimum rates (not exceeding 40 cents an hour) to be fixed industry by industry. But again to guard against the forces of inertia we provided that *all industries covered by the act* must be brought up to a minimum of 40 cents not later than 7 years after the effective date of the act, unless it should be definitely established by a preponderance of the evidence that such a rate would substantially curtail employment in the industry." (Italics supplied).

[9] 83 Cong. Rec., 75th Cong., 3d Sess., pp. 9158-9162.

[10] 83 Cong. Rec., p. 9164.

The same concept of the coverage of the Act was repeated by Senator Thomas in a subsequent statement, almost immediately following:[11]

> "With the powers of the administrative agency so limited, we decided to set up, in place of the administrative board provided in the Senate bill, an independent Administrator in the Labor Department. We authorized the Administrator to set up, as soon as practicable after the act becomes effective, *an industry committee for each industry affected by the act* to make recommendations to him concerning the establishment of minimum wages for such industry, which may be higher but not lower than the *rigid minima prescribed in the act for industry generally.*" (Italics supplied).

Shortly after the submission of the Conference Report and the explanatory statements of Senator Thomas, Senator Borah and Senator Bailey engaged in a debate on the constitutional power of Congress to regulate wages and hours of *all* workers employed by an employer engaged in an interstate business.[12] It seems clear that both Senator Borah and Senator Bailey understood the bill to attempt to reach only employees of an employer who himself was engaged in commerce or in the production of goods therefor.[13] Their disagreement was on the question as to whether it would be constitutional, assuming that the bill reached all employees of an interstate employer regardless of their duties.

To put this discussion at rest, Senator Claude Pepper, a member of the Conference Committee, arose to explain that the difficult constitutional question which was being discussed by Senators Borah and Bailey was in effect academic since the bill did not go so far as Senator Bailey

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[11] 83 Cong. Rec., p. 9164.

[12] 83 Cong. Rec., pp. 9166-9175.

[13] For evidence of this fact see the discussion by these Senators in 83 Cong. Rec., pp. 9166, 9167, 9169, 9170, 9172.

feared. Senator Pepper stated that it did not apply to all employees of an industry which itself is engaged in interstate commerce but only to employees who are both employed in an interstate industry and are themselves engaged either in interstate commerce or in the production of goods for interstate commerce. Senator Pepper's statement was as follows:[14]

> "So that the conference committee had before it the question of whether this proposed law should be applied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce." * * *
>
> "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or in the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

The Administrator has urged that Senator Pepper's statement above quoted may be compatible with the proposition that employees may come within the Act even though their employer is not himself engaged in interstate industry.[15] The fallacy of this contention is immediately disclosed when Senator Pepper's statements are read, as they properly should be, in the context of

[14] 83 Cong. Rec., p. 9168. The temporary interruption by Senator Chavez of the discussion between Senators Borah and Bailey seems not to affect the bearing of Senator Pepper's remarks.

[15] This viewpoint has been adopted in *Fleming* v. *American Stores Company*, 42 F. Supp. 511 (E. D. Pa., Dec. 30, 1941), which of course was bound to follow the decision of the Third Circuit below.

the surrounding discussion and of the statements made by Senator Thomas at the time of the submission to the Senate of the Conference bill.

Should any doubt however remain as to the correct interpretation of Senator Pepper's remarks, it is eliminated by a subsequent statement made by Senator Pepper in response to a further objection by Senator Bailey.[16]

> "Mr. Pepper. If the Senator will allow me once more, I will not interrupt him further. On the contrary, the conference report provides that resort may be had to the circuit court of appeals by any petitioner who alleges that he is unlawfully affected by this bill, and *if he may be able to show that he is not engaged in commerce or is not engaged in the production of goods for interstate commerce it will be the duty of the court to exempt him from the application of the law.*" (Italics supplied.)

The Court below did not attempt to reconcile the result that it reached with the explanations of the scope of the Act given by the Senate conferees. No attempt was made because, we believe, no reconciliation is possible. Instead the Court ignored the explicit statements by Senate spokesmen and relied entirely upon general language in the report of the Conference bill given to the House by its conferees.[17]

That language, as quoted in the opinion below, is as follows:

> "Section 6 of the conference agreement provides for the establishment of minimum wages for employees engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the

[16] 83 Cong. Rec., p. 9168.

[17] H. Rep. No. 2738, 75th Cong. 3d Sess., pp. 29-30.

employer was engaged in commerce in any industry affecting commerce * * *.

"Section 7 of the conference agreement provides for the establishment of maximum hours of employment for employees engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the employer was engaged in commerce in an industry affecting commerce * * *."

This statement of the House conferees cannot, of course, be given any independent probative force inasmuch as it merely paraphrases and contrasts the respective provisions of the House bill with those of the Conference Committee bill.

It will be recalled that the House bill provided that "every employer engaged in commerce in any industry affecting commerce shall * * * pay *each* employee employed by him * * *" certain minimum wages and also that "no employer engaged in commerce in any industry affecting commerce shall employ *any* of his employees * * *" in excess of certain maximum hours without paying overtime compensation.

Accordingly the House conferees were reporting to the House that the conferees had changed the House bill by deleting from those sections which became Sections 6 and 7 of the Act the foregoing language which had appeared in the House bill. Obviously if the Senate conferees had adopted a similar report to the body of the Senate, such a report would have contrasted Sections 6 and 7 of the Conference Committee bill with the corresponding provisions of the Senate bill. The above quotation from the House conferees' report of course contains no indication of the reason for the changes in these sections, and, as is common in such documents, in treatment of particular sections, it makes no reference to the plan of the Act as a whole.

The Petitioner readily admits not only this change, but also that in conjunction therewith the limitation as to the type of employee covered by the Act, which was included in the Senate bill, was in substance restored. But in view of the ample evidence in the Act as a whole of its application upon an industry basis, the change in these sections can be attributed only to the desire of the Conference Committee to emphasize that *not all* the employees of an employer engaged in an interstate industry should be covered by the Act, but only those types of employees which it specified. In other words, having already made clear the general industry basis of the Act, Sections 6 and 7 were now chosen by the Conference Committee to make clear its intentions with regard to employee coverage, whereas the House bill had chosen this point for a delineation of the necessary type of employer coverage.[18]

It may therefore properly be said that the Conference Committee restored the test of coverage contained in the Senate bill, *provided* that this statement is limited to coverage as to *employees*.[19]

Not only in the Senate, as has been shown above, but in the House as well authoritative discussion seems clearly to support the Petitioner's contention. For example, Representative Schneider, a member of the Committee on Labor of the House (to whom Representative Welsh, a member of the Conference Committee and one of the managers of the bill in the House, yielded), in discussing the scope of the bill, stated:[20]

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[18] The fact which the Administrator has pointed out in his Brief in the Circuit Court of Appeals (p. 28), that the exemptive provisions of the Act run specifically to employers in some instances and to employees in others is still another indication that Congress was thinking in terms of the dual tests of coverage.

[19] In view of the "industry" background of the Senate bill recited therein, it is possible that the statement might also apply to employer coverage. See *supra*, pp. 31-32.

[20] 83 Cong. Rec., p. 9260.

"The measure as reported out by the conference report *applies to interstate business exclusively.* This is of course, very well known. It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape or form affect intrastate or purely local or State business. *It covers only interstate commerce; that is business which is interstate in character.*"

* * * * * * *

"By starting with such a low minimum wage of 25 cents an hour for the first year, the law will not affect any industry disastrously. However, it is well to realize that Congress, by the passage of this act, is going on record to the effect that *an industry or business of an interstate character* which cannot pay at least 25 cents an hour to its employees has no justification or reason for existence." (Italics supplied.)

(3) Petitioner's interpretation is confirmed by administrative and constitutional considerations deemed important by Congress.

(a) *Administrative flexibility* vs. *blanket standards.*

From the outset of Congressional discussion of a Fair Labor Standards Act one of the most important questions was whether wage and hour standards should be set in blanket terms in the statute itself or whether they should be determined and applied by an administrative body. The Senate bill used the more flexible approach. The House bill provided fixed standards. However, it did not operate directly but only after a prior determination by the Secretary of Labor that an industry was one *"affecting commerce."* Thus even the House bill was not so rigid and automatic in operation as Sections 6 and 7 of the Act if they are considered in isolation, as the Administrator contends they should be.

The bill written by the Conference Committee was regarded as a compromise. Sections 6 and 7 embody the House approach of fixed standards while Sections 5 and 8 represent the Senate view that flexibility was desirable. This compromise was of course accepted by the Senate Conferees[1] with the understanding that the two sets of sections would cover the same area and be co-ordinate in operation.

The question of administrative flexibility versus blanket statutory standards was not merely a legislative problem in the choice of methods of administration. It was also regarded as an important constitutional problem and was consciously faced as such by Congress from the beginning.

Thus at the joint hearings on the proposed legislation held by the House Committee on Labor and the Senate Committee on Education and Labor, the opening statement of the then Assistant Attorney General Robert H. Jackson expressed grave doubt as to the Congressional power to fix a single minimum wage rate and maximum work week, which would be inflexible and generally applicable to all industry throughout the Country. He said that if Congress did so it would run the risk of having its right to do so "tested in the Courts under its most unfavorable aspect as a violation of due process."[2] Mr. Benjamin Cohen appeared before the sub-committee of the House

[1] See Forsythe, *Legislative History of The Fair Labor Standards Act*, 6 Law & Contemp. Problems, pp. 464, 473:

"The deadlock in the conference was holding up adjournment and it was freely predicted that once again the wage and hour legislation would fail. Senators Ellender and Pepper, members of the conference, at first refused to accede to a statutory wage ever going above 30¢ an hour, but compromises as to flexibility in attaining minima and the inclusion of a provision which could be construed to allow regional differentials (although expressly disclaiming it) paved the way to agreement in the conference and a completely rewritten bill. This was adopted by the House on June 13th and by the Senate on June 14th with comparatively little debate."

[2] Joint Hearings before The Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. (1937), p. 20. Hereinafter cited as "Hearings."

Committee on Labor prior to action upon the Senate bill by the House of Representatives in 1938 and expressed the same doubts, stating that it would be preferable to provide a flexible minimum to be determined by an independent administrative body.[3] Mr. Gerard Reilly, the then Solicitor of the Department of Labor, not only appeared before that sub-committee and agreed with the testimony of Mr. Cohen but he also submitted a brief in which he questioned the power of Congress to fix a single inflexible minimum wage and maximum work week without violating the "due process" clause of the Fifth Amendment. On the other hand he pointed out that this Court had upheld the power of a state to fix minimum wages under a statute which delegated to a fact finding agency the power to establish varying wage rates in accordance with the guides and standards set forth in the statute.[4]

The doubts set forth above extended not to merely a portion of the field covered by the proposed legislation, but to a matter equally applicable throughout its entire scope. It is hard to resist the conclusion that the retention in the Conference agreement of the flexible wage provisions of the Senate Bill was due in large part to these expressions, and thus that Congress intended the scope of its corrective, flexible wage provisions to be coextensive with Sections 6 and 7 which uniformly applied to all interstate industries.

(b) *Congressional regard for doubts as to the extent of its power to regulate wages and hours.*

That Congress intended to make the Act applicable only to employees of an employer engaged in interstate commerce or in the production of goods therefor is further evidenced by Congressional recognition of constitutional problems relating to the extent of its power to pass any such legislation at all. For years this Court had held that legislation providing for minimum wages or mini-

[3] 83 Cong. Rec., 75th Cong., 3rd Sess., page 7302.

[4] *Ibid.*, pp. 7301-7302.

mum prices in private industries violated "due process" by interfering with liberty of contract. However in 1934 it conceded the validity of a state statute regulating price fixing;[5] and on March 29, 1937, less than two months prior to the introduction in Congress of the original bills which were the antecedents of the Act, it held valid a state statute providing for the establishment of minimum wages for women.[6] In each case, a divided court by the narrow margin of a five to four vote, while recognizing the general doctrine against impairment of liberty of contract, found that whatever infringement upon this right had taken place was justified by considerations of life and health, and the protection of business essential to the economic vitality of the State.

Although this Court in those cases did not concede the plenary power of Congress or of the States to enter the field of price or wage regulation, yet the two decisions were regarded as establishing new outposts in the permissible area of industrial regulation.

Not only had this Court prior to those decisions held that legislation providing for minimum wages in private industry violated "due process"; but it had also held that Congress had no power to fix the wages and hours of employees engaged in production in interstate industry since production preceded commerce and production was a local matter over which Congress had no control.[7] However, on April 12, 1937, exactly six weeks before the original bills were introduced, it held the National Labor Relations Act constitutional.[8] In the light of that decision there was justification for the opinion that Congress had the power under the commerce clause to enact labor legislation with respect to interstate industry, although, of course, the exercise of that power was limited by the "due process" clause of the Fifth Amendment.

[5] *Nebbia* v. *New York*, 291 U. S. 502 (March 5, 1934).

[6] *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (March 29, 1937).

[7] *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (May 18, 1936).

[8] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (April 12, 1937).

Under the National Labor Relations Act, however, the test of coverage was the nature of the *employer's* business and the extent to which an interruption thereof resulting from unfair labor practices would tend to obstruct interstate commerce. This Court, while upholding the validity of that Act, pointed out that that Act did "not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce" but purported "to reach only what may be deemed to burden or obstruct * * * commerce."

The Court further stated, "whether or not particular action does affect commerce * * * is left by the statute to be determined as individual cases arise."[9] Such a statute obviously was far different from one which attempted, in the exercise of power granted under the commerce clause, to fix wages and hours of employment in interstate industry generally irrespective of whether the existence of substandard wages and hours in individual cases had any effect upon commerce.

It was in this state of the development of constitutional law that Congress, in the exercise of its power to regulate interstate commerce, approached its task of attempting to frame an act fixing minimum wages and maximum hours of employment of employees engaged in interstate industries. It is hardly an exaggeration to say that no legislation which Congress had theretofore considered was approached by that body with greater consciousness of the constitutional questions involved. The provisions of the original bills probably incorporated more constitutional theories than any other piece of suggested legislation in the history of the country. The idea was, as Mr. Jackson indicated,[10] to consolidate all hopeful approaches to constitutionality. He stated:

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[9] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 32 (1937).

[10] Hearings, p. 54.

"This act combines everything, and is an effort to take advantage of whatever theories may prevail on the Court at the time that the case is heard."

In an effort to frame an act which would at one and the same time eradicate the evils of sub-standard labor conditions "in industries engaged in commerce or in the production of goods for commerce", and be free from doubts as to its constitutionality, it seems clear that Congress intended the coverage of the Act to depend not only upon the interstate nature of the activities of the particular employee but also upon the interstate character of the employer's business.

(4) Judicial Authority.

In addition to the decision of the Third Circuit in the instant case and that of the Second Circuit in the case of *Fleming* v. *Arsenal Building Corporation*,[1] the applicability of the Act to building service employees employed by a landlord who rents space to tenants engaged in interstate commerce or in the production of goods therefor, has as stated above been presented before different federal and state courts in five other cases, all of which have held, contrary to the two above Circuits, that the Act does not cover such employees. Thus, on the specific question raised in the present case—viz., the application of the Act to building service employees—the score is five to two against the view of the Third Circuit in the present case.

Of the five adhering to the majority view, four proceed on the principle *inter alia* that the Act is not applicable to employees of an employer who himself is neither engaged in interstate commerce nor in the production of goods therefor,[2] thereby affording judicial support for the view of the Petitioner here asserted.

[1] 125 F. (2d) 278 (C. C. A. 2d., Dec. 30, 1941).

[2] The other proceeds on the theory that such employees are not engaged in the production of goods for interstate commerce since their services do not directly contribute to such production. *Robinson* v. *Massachusetts Mutual Life Insurance Company*, 158 S. W. (2d) 441. See pp. 63-64, *infra*.

Thus, in *Killingbeck and Riddoch* v. *Garment Center Capital, Inc.*, 259 App. Div. 691, 20 N. Y. Supp. (2d) 521 (1940),[3] on facts substantially the same as those here involved, the Court directed that judgment be entered for the defendant and in its opinion stated:

> "We think that the statute does not include such employees *when they are not employees of a manufacturer who is engaged in interstate commerce.*"

Similarly, in *Merryfield, et al.*, v. *F. M. Hoyt Shoe Corporation*, 41 F. Supp. 794 (D. N. H. Nov. 6, 1941),[4] the Court in its opinion stated (p. 796):

> "I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act."

And in *Cecil, et al.*, v. *Gradison, et al.*,[5] the Court of Appeals for the First Appellate District of Ohio stated:

> "• • • it is clear that the Act does not apply to employees of intrastate employers engaged to and actually performing intrastate acts, notwithstanding such intrastate acts incidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

To the same effect is *Johnson* v. *Filstow, Inc.*, 5 W. & H. Rep. 286, decided by the United States District Court for the Southern District of Florida on March 30, 1942.

Cases which have specifically considered the question in fields other than that of building operation are likewise in accord with the position herein taken.

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[3] See *supra*, p. 9.

[4] See *supra*, p. 10.

[5] See footnote 4, p. 10, of this Brief, *supra*.

Thus, in *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 262 App. Div. 665 (N. Y. Sup. Ct., App. Div., Nov. 12, 1941), suit was brought for overtime compensation asserted to be due under the provisions of the Act by employees who were employed by the defendant, a construction company under contract with an interstate railroad company to construct new abutments under railroad bridges and to repair the superstructures of other such bridges. In the course of its opinion holding that the Act did not apply to the plaintiffs, the Court stated as one of its grounds for denying recovery:

> "Nor were these plaintiffs employees of a manufacturer engaged in the production of goods for commerce. The defendant here was merely a contractor engaged in local construction and repair work for the railroad corporation."

In *Farr* v. *Smith Detective Agency and Nightwatch Service, Inc.*, 38 F. Supp. 105 (N. D. Tex. April 14, 1941), the defendants were engaged in supplying watchman service to their customers who were engaged in various business activities. The plaintiff, a night watchman, was employed by the defendants and was assigned to watch the premises of a bank alleged to be engaged in interstate commerce. Suit was brought to recover the amount of overtime payments to which the plaintiff claimed he was entitled under the Act. The defendants moved to dismiss the action, *inter alia*, on the ground that the plaintiff did not allege that the defendants were engaged in interstate commerce. In sustaining the motions to dismiss the Court said:

> "It [the Act] is a statute which is quite plain itself. It has penalties and obligations and criminal liabilities and *is directed at employer and employee engaged in interstate commerce.* An officer who walks down the street and who happens to be assigned for

> the moment or for the month to a place which is engaged in interstate commerce, does not thrust his employer in interstate commerce. His employer is not engaged in producing goods for interstate commerce. He ought not to be subjected to the penalties and pains of the statute." (Italics supplied).

A similar conclusion was reached in *Baggett* v. *Henry Fischer Packing Company*, 37 F. Supp. 670 (W. D. Ky. February 24, 1941). There the plaintiff brought action to recover from the defendant wages which he alleged the defendant owed to him under the provisions of the Act. In the course of its opinion the Court stated:

> "Since the complaint claims jurisdiction of the Federal Court by virtue of the provisions of the Fair Labor Standards Act it is necessary that it state sufficient facts to show that such jurisdiction exists. *As above pointed out one of those facts is that the plaintiff, as well as the defendant, be engaged in commerce or in the production of goods for commerce.*" (Italics supplied).

To the same effect is *General Tobacco and Grocery Co.* v. *Fleming*, F. (2d) (C. C. A. 6th, Feb. 5, 1942),[6] where the Court stated:

> "Such employer, to be subject to the coverage of the Act, must be engaged in interstate commerce or in the production of goods for interstate commerce."

Decisions can of course be found containing dicta to the effect that the test of coverage is dependent solely upon the activities of the individual employee regardless of the nature of the business in which the employer is engaged. However, those cases for the most part are of

[6] So far as we have been able to determine, the decision has not as yet been officially reported. However, a complete copy of the opinion appears in 5 W. & H. Rep. 103.

the type where it is apparent that the employer was engaged either in interstate commerce or in the production of goods therefor and thus the only question before the Court was whether the activities of the employees in question were of the requisite type to bring them within the Act.[7]

The only decision cited by the Second Circuit, in its opinion in *Fleming* v. *Arsenal Building Corporation, et al., supra,* (other than the decision of the Third Circuit in the instant case), as being opposed to the contention here asserted, is that of *Allen* v. *Moe,* 39 F. Supp. 5 (D. Idaho N. D. 1941). But the decision in that case is most explicit authority in support of the Petitioner's contention that Section 7 of the Act extends only to employers engaged in commerce or in the production of goods therefor. Thus, the Court stated:

> "It seems clear that section 207 (a) [sec. 7] relating to maximum hours relates to the employer who is engaged in commerce or in the production of goods for commerce: • • •".

The only case cited by the Third Circuit in the instant case as authority for the view that the application of the Act is determined solely by the character of the employee's work is *Hall* v. *Warren-Bradshaw Drilling Co.,* 40 F.

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[7] To this class of cases belongs *Sunshine Mining Co.* v. *Carver,* 34 F. Supp. 274 (D. C. Idaho, 1940), where the employer was a mining company which extracted ore which it sold within the state to a smelter who in turn sold and shipped the metal derived therefrom in interstate commerce; *Wood* v. *Central Sand & Gravel Co.,* 34 F. Supp. 40 (W. D. Tenn. 1940), where the court held the employer to be engaged in interstate commerce; and *Rock* v. *Zarnocay,* 4 W. & H. Rep. 305 (N. Y. Sup. Ct. 1931), where it was held that the Act applied to an employee who made interstate tours with his employer's band, loaded and unloaded the baggage and equipment of the band on tour from state to state and assisted in radio broadcasting over interstate hookups. Compare *Fleming* v. *Goldblatt Bros., Inc.,* 39 F. Supp. 701 (N. D. Ill. 1941); *Gerdert* v. *Certified Poultry and Egg Co.,* 38 F. Supp. 964 (S. D. Fla. 1941); and *Abadie* v. *Cudahy Packing Co.,* 37 F. Supp. 164 (E. D. La. 1941), in all of which the Court stated that it is difficult to see how an employee could be engaged in commerce or in the production of goods for commerce unless his employer were likewise engaged.

Supp. 272 (N. D. Tex. 1941). It is true that that District Court appeared to express such a view. But however that may be, the Fifth Circuit Court of Appeals, in affirming the decision of the District Court, found the employer to be engaged in the production of goods for interstate commerce. In its opinion it stated:[8]

> "Appellant and its employees are engaged generally in mining for and the production of oil in this state, * * *."

Thus, the Act itself, its legislative history, and the great preponderance of judicial authority all support the view that the Act is not applicable to employees of an employer who himself is neither engaged in interstate commerce nor in the production of goods therefor.

III

PETITIONER'S MAINTENANCE AND SERVICE EMPLOYEES ARE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE WITHIN THE MEANING OF THE ACT AND CONSEQUENTLY ARE NOT COVERED BY IT.

(1) Preliminary statement; Administrator's contention.

Some of the Petitioner's tenants are engaged in the production of goods for interstate commerce; and since the Petitioner's employees are employed in maintaining and operating the building in which those tenants conduct their manufacturing operations, the Administrator contends that their services are "necessary" to the production of the tenant's goods and thus that such employees are engaged in the production of goods for commerce and consequently covered by the Act.

This contention is based upon Section 3 (j) which provides as follows:

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[8] *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5th, Dec. 9, 1941. *Cf., Boyd* v. *Dowell, Inc.*, 5 C. C. H. Labor Cases par. 60, 770 (D. C. Lea Co. N. Mex., 1941).

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics supplied.)

The Administrator's entire case[1] is based upon the word "necessary" contained in the last phrase of this definition. He has taken a very broad view of its meaning, contending in effect that *any* employee of an employer engaged in commerce or in the production of goods for commerce is "necessary to production." He reasons that even building maintenance, service and clerical employees of an interstate employer must be covered because "if they were not doing work 'necessary to the production' of the goods they would not be on the payroll".[2] In other words he has taken the position that the running of a business enterprise is equivalent to the physical production of goods.[3]

Many courts, actuated no doubt by a desire to give the broadest possible scope to what they regard as a "remedial" statute, have followed the Administrator's

[1] It is also contended that the elevator operators are engaged "in commerce". This subsidiary argument is discussed separately, *infra*, pp. 69-75.

[2] Interpretative Bulletin No. 1, issued Sept. 22, 1938, 1941 W. & H. Manual, p. 28.

[3] The Administrator's view is boldly stated in his Brief in the Circuit Court of Appeals at pp. 25 and 26. Thus he states:

"The end of the enterprise being production, the assertion that an employee is necessary to the enterprise seems tantamount to an admission that he is necessary to production."

Common knowledge suffices to drive home the distinction between business enterprise and production. The former deals with the financial side of affairs and looks toward the making of a profit. But the dictates of business enterprise may lead to actual *curtailment of production*, as in times of business recession. The distinction is basic in economic thought. *Cf.*, Veblen, *The Theory of Business Enterprise*, etc.

view and have held various maintenance and service employees when employed by an interstate employer, subject to the Act.

The Administrator now attempts the still further step of including building maintenance and service employees not of an interstate producer but of one who contracts with such a producer to supply building space (together with the building service commonly connected therewith). He predicates his argument upon the reasoning that if such employees had been employed by each of the manufacturer-tenants rather than by the landlord, there would be no question but that their services were "necessary" to the enterprise engaged in the production of the goods. Consequently they must come within the Act even though their services are rendered to an employer who is not a manufacturer but merely a landlord.

This attempt has succeeded in the Second Circuit. The Third Circuit in the present case went even further by holding that the word "necessary" included not only those employees whose services were deemed indispensable to production but also those whose services were deemed "*convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce.*"[4] All other courts that have considered the precise question of building maintenance and service employees of a landlord have held to the contrary.[5] They have realized that it would do violence to the intention of Congress to go so far.

(2) The statutory definition of the word "produced" as contained in Section 3(j) of the Act.

The wording itself of the definition of "produced" strongly suggests that the Administrator is in error, even

[4] Opinion of the Third Circuit Court (R., pp. 219-220).

[5] See pp. 62-65, *infra*.

where maintenance employees are in the hire of an interstate enterprise. The definition in Section 3 (j) begins by saying that—

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; * * *"

The definition then continues to state that an employee shall be deemed to have been engaged in the production of goods if such employee was employed in—

> "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

It would be difficult to frame a definition better adapted to the purpose of delimiting and describing activity devoted to the physical[1] production of tangible[2] goods. That is the obvious objective of the definition and its common core of meaning. Various words, more or less synonymous, were named to make sure that all processes integrally related to physical production of goods would be covered. Finally, to make certain that this enumeration had not left any gaps, there was added a catch-all phrase, "or in any process or occupation necessary to the production".

Not even the Administrator has contended that the

[1] The word "physical" as used above is of course redundant. It is inserted only to emphasize that when Congress said "production", it meant production in the sense normally (until the advent of the Administrator) given to it.

[2] Section 3 (i) of the Act states: "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Petitioner's employees produce, manufacture, mine, handle, transport or in any other manner work on goods. He relies entirely on the catch-all phrase.

According to the Administrator this phrase adds something new and different to the definition. He says, "This definition has, in effect, two parts",[3] the implication being that the second is more or less independent of the first. He even contends that the word "necessary" here should be treated as if it were the focal word of the general enabling clause of the Federal Constitution and the Court below has adopted this view.

Such an interpretation is of course out of place here. If ever a word or phrase should be interpreted by reference to its context, this surely is such a case. As stated in *McCulloch* v. *Maryland*, 4 Wheat. 316, 414 (1819):

> "It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports."

We submit that the Court below has disregarded this admonition of Chief Justice Marshall. It has taken the word "necessary" out of its context and given it a highly excessive meaning. It has been frankly willing to include not only employees whose activities it called "indispensable * * * to the production by the defendant's tenants", but also activities of those employees which

[3] Administrator's Brief in the Circuit Court of Appeals at p. 13. The "two parts" are the last phrase and the entire definition preceding that phrase.

could only be termed "*convenient* and *appropriate* to the maintenance of a building *suitable* for the manufacture of goods for commerce" (R., pp. 219-220).

Disregarding constitutional difficulties for the moment, Congress certainly could never have intended to include all employees whose activity is "*convenient and appropriate*" to a facility that is "*suitable*" for the production of goods for interstate commerce, nor even all employees whose activity is "indispensable" to production. Food for workers is indispensable to production by such workers. But it is not necessary for us to recount a "parade of horribles". The imagination of this Court can readily supply examples of activity which would satisfy the tests of coverage advanced by the Court below but which could hardly be brought within the Act without giving the terms of the statute, and indeed the terms of the Constitution, the sort of unrealistic treatment that has been associated with ancient legal fictions.[4]

We do not, of course, pretend to be able to furnish a precise definition of the word "necessary" which will automatically answer all questions in every case that comes before the courts. Perhaps some employees are to be included who do not come in physical contact with the goods. But this much is certain. Some limiting factor must be placed upon the meaning of the words "process or occupation necessary to the production of goods." We believe that Congress meant to provide such a limiting factor by restricting the Act to industries engaged in commerce or the production of goods for commerce. As we shall see, the cases decided under this Act have recognized this limiting factor. While

[4] We are reminded for example of the writ of *quo minus* by means of which an ancient tax collector's office became the Court of Exchequer. Eventually all sorts of actions were entertained on the ground that recovery would help the plaintiff pay his taxes! Just so here the Administrator would bring within the jurisdiction of the Act activity having only the remotest connection with interstate commerce.

there are cases that have held the Act to include various maintenance employees performing duties similar to those here presented, in every one of these cases, the courts have been dealing with an employee of an interstate employer.

Moreover, not all employees even of an interstate producer were to be covered, and certainly not those building service and maintenance employees of an intrastate employer, such as the Petitioner herein, whose services do not directly function in the production of goods for commerce in any real sense. This is made clear in the most explicit terms by the legislative history of the Act.

(3) Legislative history.

It is not enough that an employee have *some* relation to or contribute to the economic advancement of an interstate employer. Nor is it sufficient that the services of an employee *affect* commerce or the production of goods for commerce. Congress meant to exclude from the Act employees who do not function directly in the production of goods even though they may be employed by an interstate employer (which of course is not the case here).

As has been mentioned above, the House Bill covered *all* employees of an interstate employer. The Senate Bill did not: it covered only such of those employees as were themselves engaged in commerce or the production of goods for commerce. In the Act as finally adopted, the Senate version prevailed. The matter was explicitly treated in the Senate discussion of the Conference Report by Senator Pepper,[1] a member of the Conference Committee.

[1] 83 Cong. Rec. 9168.

> "I want it distinctly stated that *this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce,* and the contrary theory was definitely rejected by the committee." (Italics supplied)

The Administrator concedes that the Senate Bill prevailed.[2] In the light of Senator Pepper's statement it would be impossible to do otherwise. Yet the Administrator has adopted a business enterprise theory of "production" which directly contradicts the statement of Senator Pepper. In other words Congress rejected the House version but the Administrator adopted it!

Congress made it emphatically clear that not all employees of interstate employers were covered by the Act. "Production" does not mean business enterprise. But that is not all. The legislative history contains still further evidence that Congress did not intend to give an all-inclusive meaning to the words "production", "produce", or "necessary to production".

The Act as finally drafted by the Conference Committee deliberately rejected the theory of coverage based upon activity *"affecting commerce"* (that appeared in previous drafts) and adopted only the theory of coverage based upon activity "in commerce or in the production of goods for commerce". The words "affecting commerce" were of course well known to Congress. They had been used various times before; and they had been

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[2] This is not to say that Petitioner and Respondent agree as to other aspects of the matter. The Administrator also contends: (1) that the Senate version covered employees engaged in production even when their employer was not so engaged; and, (2) that in this respect also the Senate version prevailed. We believe these contentions to be erroneous. But there is no disagreement that as to employers "engaged in commerce or in the production of goods for commerce", only those employees are covered who are themselves so engaged.

recognized as coinciding with the maximum area subject to Congressional action under the commerce power.

Both the original bills introduced in Congress on May 24, 1937,[3] declared in almost identical terms that "The employment of workers under sub-standard labor conditions in occupations in interstate commerce, in the production of goods for interstate commerce, *or otherwise* directly *affecting* interstate commerce", has adverse effects upon interstate commerce the elimination of which "in occupations in and directly *affecting* interstate commerce" required Congressional action.

Furthermore, both the bill which passed the Senate on July 31, 1937,[4] as well as the bill which passed the House on May 24, 1938,[5] contained substantially identical statements of purpose.[6] The Senate bill was designed to eliminate sub-standard labor conditions "in occupations in and directly affecting interstate commerce" through the declaration by the Labor Standards Board of minimum wages and maximum hours for such occupations as were brought within the provisions of the bill; and the House bill was made applicable only when the Secretary of Labor determined that a given industry was "an industry *affecting* commerce".

However the Conference bill which ultimately became the Act eliminated these references to occupations or to industries "*affecting* commerce" and was limited by its terms to employers and employees "engaged in commerce or in the production of goods for commerce".

The rejection by the Conference Committee of the words "*affecting* commerce", which had been contained in the

[3] S. 2475 and H. R. 7200, Section 1.

[4] This was the bill reported by the Senate Committee on Education and Labor and was introduced in the Senate July 8, 1937, S. 2475, 75th Cong., 1st Sess., Calendar No. 905, as amended from the floor.

[5] This was the bill reported by the House Committee on Labor and introduced in the House on April 21, 1938. S. 2475, 75th Cong., 3rd Sess., Union Calendar No. 804, as amended from the floor.

[6] Section 1 of Senate bill, Section 2 of House bill. The latter differed slightly by omitting the word "directly" just before the word "affecting."

successive previous drafts of the statute, and the adoption in the Conference bill of the words "production of goods for commerce", graphically indicates that Congress did not intend that the scope of the Act should extend to acts merely "*affecting* commerce", but intended that it should cover only acts directly functioning in the "production of goods for commerce."

The significance of the change from the basis of "affecting commerce" to the narrower ones of "in commerce" and "production for commerce", and the contrast between the scope of the National Labor Relations Act and the Fair Labor Standards Act, have been recognized by many decisions. Thus in *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202, 206 (C. C. A. 10th, 1941), the Court stated:

> "The Act by its terms is limited to employees engaged in interstate commerce or in the production of goods for interstate commerce. *It does not extend to employment that merely affects interstate commerce.* If there could be doubt as to the correctness of this interpretation, it is set at rest by the legislative history of the Act." (Italics supplied.)

In *Chapman et al.* v. *Home Ice Co.*, F. Supp. , 5 W. & H. Rep. 133 (W. D. Tenn., Jan. 25, 1942), it was pointed out that:

> "We are not dealing with interstate commerce in its broad sense, but rather in a limited way under a particular act. Congress did not see fit to fix the coverage too broadly. It seems to have given consideration to those things which are reserved to the States under the Constitution. It might have used the phrase 'affecting commerce' as in the National Labor Relations Act * * *, had it not intended there should be a definite line drawn. The coverage here is limited to those employees who are engaged 'in commerce' *per se* or are engaged in the *production* and *handling* of goods and merchandise intended

for sale and distribution in the business world across State lines. • • •

"Here the words 'production for commerce' denote an intention to deal in a restricted way with the question of coverage in connection with those employed directly in the production of articles to be sold, shipped or transported across State lines 'in commerce'. • • •

"There is no question but that the icing of cars to preserve interstate shipments 'affects' the transportation of perishables. Indeed there could be no shipments of this class unless ice is used, but we are not dealing with coverage on so great a scale. We cannot add to the Act and make it cover broadly those things which 'affect' commerce. We take the Act as we find it." (Italics supplied).

And in *Merryfield* v. *F. M. Hoyt Shoe Corporation*, 41 F. Supp. 794 (D. N. H. 1941), the Court stated:

"The Fair Labor Standards Act is by its terms limited to employees engaged in interstate commerce, or in the production of goods for interstate commerce and does not extend to employment that merely affects interstate commerce."[7]

(4) Judicial authority.

Numerous cases have dealt with the question whether maintenance and service employees are engaged in the production of goods for commerce within the meaning of the Act. The results show considerable difference of opinion.[1]

[7] See also *Johnson* v. *Filstow, Inc.*, 5 W. & H. Rep. 286 (So. D. Fla. Mar. 30, 1942).

[1] Cases refusing to apply the Act include: *Rogers* v. *Glazer*, 32 F. Supp. 990 (W. D. Mo. 1940); *Brown* v. *Bailey*, 147 S. W. (2d) 105 (Tenn. Supreme Ct. 1941); *Brown* v. *Carter Drilling Co.*, 38 F. Supp. 489, (S. D. Tex. 1941); *Pedersen* v. *Fitzgerald Construction Co.*, 262 N. Y. App. Div. 655 (1941); *Overstreet* v. *No. Shore Corp.*, 4 W. & H. Rep. 628 (S. D. Fla. 1941); *Carlton* v. *London Mines*, 4 W. & H. Rep. 561, (Colo. Dist. Ct. 1941); *Hart* v.

It is highly significant, however, that this difference of opinion extends only to the case where employees have been in the hire of an interstate employer. In that situation a number of the courts have held the Act applicable. With respect to these results and the reasoning behind them several observations should be made.

In nearly all of these cases the emphasis is placed upon the interstate nature of the employer's business and many decisions explicitly assume that the proper test is whether activity is necessary or essential to the enterprise.[2] Such cases, in other words, have adopted the Administrator's view that a person "on the payroll" of an interstate employer must be necessary to that employer's enterprise and consequently his production.

As we have seen, such a view was emphatically not the

Gregory, 16 S. E. (2d) 837, (N. C. Supreme Ct., 1941); *Abadie* v. *Cudahy Packing Co.*, 37 F. Supp. 164 (E. D. La., 1941); *Cecil* v. *Gradison*, *supra*, p. 10, note 4, (Ohio Ct. of App. Nov. 17, 1941, Petition p. 53); *Robinson* v. *Massachusetts Mutual Life Insurance Co.*, 158 S. W. (2d) 441 (1941); *Merryfield* v. *Hoyt Shoe Corp. & R. F. C.*, 41 F. Supp. 794 (D. N. H. 1941); *Farr* v. *Smith Det. Agency*, 38 F. Supp. 105, (N. D. Tex. 1941); *Sybert* v. *Bradley*, 4 W. & H. Rep. 630, F. Supp. (S. D. Ill. 1941); *Cf.*, *Bowman* v. *Pace*, 119 F. (2d) 858 (C. C. A. 5th 1941) and *David* v. *Boylans*, 34 F. Supp. 555 (E. D. La. 1940).

Cases applying the Act, which the Administrator cited at p. 22 of his Brief in the Court below (excluding dicta, unreported cases and memorandum opinions that do not reveal the facts): *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1st, 1941); *McMillan* v. *Wilson*, 4 W. & H. Rep. 409 (Minn. Dist. Court, 1941); *Lefevers* v. *Gen. Export & Metal Co.*, 36 F. Supp. 838 (S. D. Tex., 1940); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, (W. D. Tenn., 1940); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 36 F. Supp. 233, (E. D. Okla. 1941); *Fleming* v. *Pearson*, 39 F. Supp. 300 (E. D. Tenn. 1941); *Doyle* v. *Johnson Bros.*, (N. Y. City Court, Kings City, 1941), 25 N. Y. S. (2d) 603, 28 N. Y. S. (2d) 452; *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio 1941); *Robinson* v. *La Rue*, 156 S. W. (2d) 432 (Tenn. Supreme Ct. 1941); *Fleming* v. *Swift*, 41 F. Supp. 825 (N. D. Ill. 1941); *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga. 1941); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y. 1941).

[2] Thus for example in *Fleming* v. *Swift*, 41 F. Supp. 825, 832 (N. D. Ill. 1941) the court named the employees and stated "* * * all of which services * * * were rendered in the course of and in connection with and *necessary and incidental to the successful conduct of the defendant's business.*" Such employees were engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act." (Italics supplied).

intent of Congress. It is not surprising therefore to find that none of the decisions applying the Act contains evidence that the court's attention was drawn to the legislative history which has been set forth above,[3] and which shows beyond question that Congress intended no all-inclusive scope to be given to the phrase "necessary to production".

Petitioner believes that the sounder doctrine is to be found in the decisions that have made clear their view that the Act was not intended to cover *all* employees of an interstate business. Thus, in *Carlton v. London Mines and Milling Company*, 4 W. & H. Rep., page 561 (Colo. Dist. Ct. Sept. 8, 1941), a state court held the Act not to apply to a weighmaster, although he was employed by a mining company engaged in the production of goods for interstate commerce. In so holding, the court disapproved the line of decisions that have held such employees as watchmen subject to the Act. Thus, it stated:

> "It would seem to be stretching a point to hold that a man whose sole contribution to production is the watching over goods falls under the definition of the Act. *If Congress had intended to attempt to include all employees it must be assumed the Act would have been so worded.* * * *."
>
> "To hold that he was, as expressed in the definition of the Act, 'employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof', is beyond the imaginative capacity of this court." (Italics supplied.)

A similar view of the plain meaning of the statute is contained in *Hart* v. *Gregory*, 16 S. E. (2d) 837 (North Carolina, Supreme Court, October 15, 1941). Here the Act was held not to apply to a night watchman, the Court stating:

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[3] See pages 55-58, *supra*.

> "We think it would be doing violence to the language of the Act to give it such elasticity as contended by plaintiff, that an ordinary night watchman came under the provisions of the Act. Our former decision did not so hold. There is a sharp conflict of decisions over the question, but whatever may be our sympathies we can only construe the law as written. None of the exceptions and assignments of error made by plaintiff can be sustained."

It has also not escaped the attention of some courts that there is a sharp distinction between activity "necessary to production" and activity necessary to the successful operation of a business. For example, in *Abadie* v. *Cudahy Packing Company*, 37 F. Supp. 164 (E. D. La. 1941), in holding the Act not to apply to a clerical worker, the court stated:

> "Even if it could be said that defendant was engaged in the production of goods for commerce because it 'handled or in any other manner worked on' the goods sold in interstate commerce, it would not follow that plaintiff was employed in an occupation necessary to the production thereof as there is no causal relationship between his occupation and production. Plaintiff's occupation may have been necessary in respect to defendant's business but his duties as ledger clerk were not so closely related to production as can be considered necessary thereto."

Although the courts have divided as to the applicability of the Act to maintenance employees of interstate employers, they have been unanimous (except for this case and *Fleming* v. *Arsenal Building Corporation*), in refusing to extend the Act to maintenance and service employees in the hire of an intrastate employer.

Most directly in point, of course, are the building employee cases. Thus, in *Killingbeck* v. *Garment Center*

Capital, Inc., 20 N. Y. Supp. (2d) 521, 259 App. Div. 691 (1940), the Court stated:

> "We would encounter insuperable difficulties however, and would distort the statute if we should apply it to employees of others than the manufacturer, having so remote and indirect a relation to the production of the goods as the watchman and the carpenter employed by a landlord a portion of whose premises have, perhaps fortuitously, been rented to tenants engaged in interstate commerce (New Amsterdam Casualty Co. *v.* State Industrial Commission, 80 Okla. 7; Rogers *v.* Glazer *et al.*, U. S. D. C., W. D., of Mo. Wage and Hour Reporter, April 22, 1940, page 158). Such employees are not engaged 'in any process or occupation necessary to the production' of goods destined for interstate commerce but in an occupation which may, perhaps, be necessary in the operation of a building wherein the goods are produced."

The opinion of the Ohio Court of Appeals in the case of *Cecil* v. *Gradison, supra,*[4] likewise states:

> "* * *. It is clear that the Act does not apply to employees of intra-state employers engaged to and actually performing intra-state acts, notwithstanding such intra-state acts incidentally facilitate the inter-state commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related."

The Tennessee Supreme Court in *Robinson* v. *Mass. Mutual Life Insurance Company, supra,*[5] reached the same conclusion.

> "We are of opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce.

[4] Ohio Ct. of App. Nov. 17, 1941, printed in Petition p. 53.

[5] 158 S. W. (2d) 441 (1941).

We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act, it is limited to those employees who contribute directly to the production of goods for interstate commerce." • • •.

"Plaintiff in error and those for whom he sues are one step removed from the class of employees embraced in the Act. In a sense every individual whose activity in any way touches or affects the lives of those engaged in producing goods for interstate commerce contribute to such production, but we think Congress intended to limit the Act to those who directly contribute to the production of the goods." • • •.

Again, in *Merryfield* v. *Hoyt Shoe Corp. and R. F. C.*, 41 F. Supp. 794 (D. N. H. 1941), it was held that the mere fact that tenants of the building were manufacturing goods for interstate commerce was not sufficient to bring within the Act the employees of the building owner even though he was formerly a manufacturer. As the opinion states:

"The plaintiffs had nothing to do with the actual manufacture of goods but were in the employ of the owners of the real estate, first, the Hoyt Shoe Corp., and, second, the R. F. C. They are set out in the complaint as firemen, watchmen and maintenance men to look after the real estate, paid by the Shoe Corporation and later by the R. F. C." (41 F. Supp. 794, 795).

In reaching this conclusion the court considered it important that the Fair Labor Standards Act is not framed to include all employment "affecting commerce".

"The Fair Labor Standards Act is by its terms limited to employees engaged in interstate commerce,

or in the production of goods for interstate commerce and does not extend to employment that merely affects interstate commerce.

"In the case of Gerdert *v.* Certified Poultry & Egg Company, D. C., 38 F. Supp. 964, 969, it is said: 'The minimum wages and maximum hours provision of the Fair Labor Standards Act relates to employees who are engaged in interstate commerce or in the production of goods for commerce, but it is difficult to see how an employee could be engaged in commerce or in the production of goods for commerce, unless his employer were likewise engaged, because the employee is merely the agent of the employer. It would be necessary, therefore, to determine whether or not the employer was engaged in interstate commerce as distinguished from a practice or business adversely affecting interstate commerce.'

"I hold that employees of a landlord who is not himself engaged in the manufacture of goods for interstate commerce but whose premises are leased to others who are engaged in the production of goods for commerce do not come within the provisions of the Wages and Hours Law of the Fair Labor Standards Act" (41 F. Supp. at 795-796).

The remaining case involving the building-employee problem is *Johnson* v. *Filstow, Inc.*,[6] and is to the same effect.

The cases outside the building-employee field have likewise been unanimous in excluding maintenance, service and repair men of a non-interstate employer whenever the question has been presented.[7]

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[6] 5 W. & H. Rep. 286, F. Supp. (So. D. Fla. Mar. 30, 1942).

[7] *Farr* v. *Smith Det. Agency*, 38 F. Supp. 105, (N. D. Tex. 1941); *Pedersen* v. *Fitzgerald Construction Co.*, 262 (N. Y.) App. Div. 665 (1941); *Sybert* v. *Bradley*, 4 Wage & Hour Rep. 630, F. Supp. (S. D. Ill. 1941); *Cf.*, *Bowman* v. *Pace*, 119 F. (2d) 858 (C. C. A. 5th, 1941) and *David* v. *Boylans*, 34 F. Supp. 555 (E. D., La. 1940) where the same result seems clearly to have been assumed.

Only the decisions of the Second and Third Circuits stand opposed, but neither contains reasoning adequate to support its conclusion. The Third Circuit simply decided the issue by looking to a few words in Sections 6 and 7 and to the last part of the definition of production in Section 3 (j). The opinion omits analysis of related sections of the Act, of the relevant legislative history, and of the judicial authorities.

The Second Circuit based its decision upon the ground that the Petitioner should be treated as if it were actually engaged in the production of goods for interstate commerce. This reasoning also led to that Court's denial that the services rendered by Petitioner are rendered in intrastate commerce. The error of this reasoning is therefore pointed out hereafter in the discussion of the "service" exemption at pages 89-91.

(5) Conclusion.

Whatever else may be said concerning the cases upon which the Administrator relies, there has at least been a limiting factor implicit in their facts and often pointed out by the courts deciding them. This factor has been that the employees were in the hire of an interstate enterprise. It is submitted that this must be the outside limit of the extension of the Act to employees of the type here involved.

The Administrator, apparently recognizing that such is the case, has attempted to overcome this handicap by suggesting that the Petitioner somehow partakes of the character of an interstate enterprise.

Thus he has pointed out in his Brief in the Circuit Court of Appeals on several occasions that Petitioner formerly itself occupied and used the present loft building as a factory in which it produced men's clothing.[1] But the facts remain undisputed in the record that since 1928 Petitioner has done no manufacturing whatsoever

[1] Administrator's Brief, Circuit Court of Appeals, pp. 5, 12, 27, 39.

(R., p. 166); that its sole activity has been to operate the building as a landlord, leasing space to any person desiring it (R., p. 166); that it has no source of revenue and no business other than that which is connected with the ownership and leasing of its building (R., p. 166); and that it has no interest or connection whatsoever with the manufacturing or other activities of any of its present or past tenants (R., pp. 166-167, 175). The Act must be applied in the light of the facts as they exist, not as they existed ten or fifteen years ago. The previous occupation of the same building for manufacturing by the landlord was also a fact in *Merryfield et al.* v. *Hoyt Shoe Corporation, et al., supra,* but it had no effect upon the Court's decision.

The Administrator has further attempted to argue that Petitioner, being the owner and operator of a building having interstate tenants, cannot be engaged in a local enterprise because the whole building is itself one enterprise of several individual factories gathered together as a unit under one roof for mutual convenience and economic advantage. But this theory ignores the facts. Whereas the building, when operated as a factory by Petitioner fourteen years ago, might well have been characterized as an economic unit, this is no longer the case. Each of the tenants is engaged in a small independent enterprise, manufacturing different articles and shipping different percentages of those articles into interstate commerce. The element of contiguous operation of separate enterprises was present in every one of the building service cases already cited, and was in every case recognized for just what it is and not as creating some sort of mystical fusion. The Act affords no basis for coverage by buildings, but is always careful to refer to "employers" and "employees".

As we have shown above it is impossible to accept an interpretation of the phrase "process or occupation neces-

sary to production" that is taken wholly out of context and in disregard of the repeated expressions of Congressional intent not to push the coverage of the Act to the limits of constitutional power. This is true whether the word "necessary" be taken to mean "indispensable", or whether it be taken to mean "convenient and appropriate", to anything that is "suitable" for production, both of which definitions were sanctioned by the Third Circuit Court of Appeals.

Almost all activity anywhere in the United States can be properly termed indispensable to production for commerce or "convenient and appropriate" to something "suitable" to such production. Such unbounded scope was never intended by the legislators who framed and passed this Act. They deliberately refused to pass an act designed to cover all activity that might "affect" interstate commerce. They stated that not all employees even of an interstate employer were to be covered but only those who functioned in an immediate and direct sense in commerce or the production of goods for commerce. The Administrator has flouted this express wish of Congress by including everyone "on the payroll", even to maintenance, clerical and service employees. Congress meant to exclude some employees but if these latter groups are covered none will fall outside the Act.

When, as here, we are not even dealing with employees of an interstate employer the case should be clear beyond doubt. Petitioner is a wholly local enterprise devoted to the ownership and management of real property. And the question before this Court is whether Congress shall be taken to have intended to include its employees simply because they may be brought under a highly expansive interpretation of a phrase that constitutes an ancillary part of a statutory definition.

IV

PETITIONER'S ELEVATOR OPERATORS ARE NOT ENGAGED "IN COMMERCE."

As a secondary argument with regard to Petitioner's elevator operators, the Administrator has asserted that they are engaged "in commerce" within the meaning of the Act and this view was adopted by the Third Circuit in the instant case. This contention should be dismissed at the outset for the reason as stated earlier that the *employer* here is engaged neither in interstate commerce nor in the production of goods therefor.[1]

In any event the phrase "in commerce" was never intended by Congress to extend to employees of the type here presented.

The record clearly shows that Petitioner, through its elevator operators, merely supplies to its tenants the means of ingress and egress for them, their employees and customers, and for property being shipped to and by them (R., p. 176). Of the three operators, one carries only passengers (R., p. 45), and this person is not the subject of the Administrator's contention.[2] Furthermore, the two freight elevator operators engage in many diverse activities, all connected with the servicing of the building in addition to elevator operation. Thus, one such operator carries passengers daily during rush hours (R., p. 36); carries other passengers, machinery, and rubbish from the premises leased by two tenants (R., p. 41); and performs the regular duties of a watchman on Saturdays and Sundays (R., pp. 42, 43). The other operator likewise carries passengers; takes down most of the trash from the upper floors of the building; makes such trash up into bales to be disposed of; cleans the outside yard; and performs the duties of a watchman at various times (R., pp. 55-56, 58-59, 62).

[1] See pp. 16-49, *supra*.

[2] Thus the Administrator's Brief, Circuit Court of Appeals, p. 39, limits his contention to the operators of the freight elevators.

Furthermore, it is noteworthy that the freight elevator operators, even during such times as their cars carry goods coming to or from the premises of the tenants, do not in any way handle or touch or have custody of such goods which always remain in the custody of representatives of the tenants, or their employees, or of employees of carriers or transfer agencies (R., pp. 37, 47, 56, 57, 83, 85, 99, 100, 109, 110, 113, 120, 121, 129, 135, 138, 149, 158, 163).

Thus, the statement of the Court below that Petitioner's elevator operators are engaged "in commerce" within the meaning of the Act can only mean that the words "engaged in commerce" must be read as covering any employee whose work remotely "affects" commerce.

But the words "employee engaged in commerce" do not mean "employee in any manner affecting commerce" nor do they mean "any employee whose activities might constitutionally be reached by Congress", as the Administrator must be contending. Such unwarranted efforts to expand the meaning of a statute have been rejected by this Court only recently in cases involving the Sherman and the Federal Trade Commission Acts. *Apex* v. *Leader*, 310 U. S. 469 (1940); *Federal Trade Commission* v. *Bunte*, 312 U. S. 349 (1941).[3]

The reasoning of the *Apex* and *Bunte* cases applies even more strongly here where there is abundant evidence that Congress consciously rejected the idea of reaching all activity affecting commerce. If "in commerce" had been thought to include the full constitutional power of Congress, there would have been no need for adding the words "or in the production of goods for commerce". Moreover, the final form of the Act rejected the phrase "affecting commerce" which was familiar to Congress through the National Labor Relations Act as comprehending the broadest scope of possible Congressional power and which had appeared in earlier drafts of the Act. Thus, it would go contrary to clear Congressional

[3] See the discussion of these cases, *supra*, p. 14.

intent to give some novel and highly expanded meaning to the words "in commerce". In particular, precedents drawn from cases decided under the National Labor Relations Act are out of place.[4]

The Federal Employers' Liability Act[5] furnishes an additional and striking illustration of Congressional recognition of the distinction between "in" and "affecting" commerce. The Act until 1939 provided that railroads engaging in commerce should be liable to any person "suffering injury while he is employed by such carrier in such commerce". In 1939 Congress broadened the scope of the Act by specifically providing that any such employee whose duties "in any way directly or closely and substantially *affect* such commerce" should be considered as being entitled to the benefits of the Act.[6]

The cases arising under that Act prior to the 1939 amendment are of course highly apposite authorities for the construction of the Fair Labor Standards Act, dealing, as they do, with the relation of employee duties to interstate commerce.

Such cases indicate beyond question that Petitioner's elevator operators are not "engaged in commerce." Thus maintenance employees of all kinds were excluded even though they facilitated and serviced the instrumentalities of interstate commerce.[7] It was also squarely held that an elevator operator in a railroad office building did not come within the Act.[8]

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[4] See pp. 58-59, *supra*.

[5] Act of Apr. 22, 1908, 35 Stat. 65, 45 U. S. C. A. Sec. 51, *et seq.*

[6] Act of Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51.

[7] *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S. 556 (1916); *Chi. B. & Q. R. R. Co.*, v. *Harrington*, 241 U. S. 177 (1916); *Chi. & E. I. R. R. Co.*, v. *Ind. Comm.*, 284 U. S. 296 (1932); *Poff* v. *Washington Terminal Co.*, 69 F. (2d) 572 (App. D. C. 1934); *D. L. & W. R. R. Co.*, v. *Yurkonis*, 238 U. S. 439 (1915); *Robinson* v. *B. & O. R. R. Co.*, 237 U. S. 84 (1915); *Wells Fargo* v. *Taylor*, 254 U. S. 175 (1920); *Chi. R. I. & P. R. R.* v. *Bond*, 240 U. S. 449 (1916).

[8] *Southern R. R. Co.*, v. *Taylor*, 16 F. (2d) 517 (App. D. C. 1926), cert. denied 273 U. S. 767. Akin to this result are cases refusing in other connections to hold elevators to constitute a "common carrier." *Seaver* v. *Bradley*,

The cases under the Fair Labor Standards Act likewise indicate that Petitioner's elevator operators are not "in commerce". The precise contention here made by the Administrator was rejected by the Ohio Court of Appeals in the case of *Cecil* v. *Gradison, supra.* After a discussion of cases decided by this Court on the question of when interstate transactions begin and end, it was concluded that the elevator operators there involved "were performing intrastate acts preceding and following interstate transactions, and were not engaged in interstate commerce." That result was reached despite allegations admitted for purposes of the case, that the elevator operators were highly important in facilitating the movement of packages in interstate commerce. The other building service employee cases have likewise refused to hold elevator operators, or indeed any other maintenance employees, to be "in commerce".[9]

The all-inclusive view of the words "in commerce" advocated by the Administrator has also been rejected by the courts in cases other than those involving elevator operators. Thus local truck drivers and like employees who move goods brought in from without a state are not

179 Mass. 329, 60 N. E. 795 (1901), and *Mitchell* v. *N. Y. Life Ins. Co.*, 75 F. (2d) 107 (C. C. A. 7th 1934). The language of Mr. Chief Justice Holmes in *Seaver* v. *Bradley* is worth noting:

> "* * * manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let."

[9] Specifically holding elevator operators to be neither "in commerce" nor "engaged in production": *Merryfield* v. *Hoyt Shoe Corp.*, 41 F. Supp. 794 (1941). In *Killingbeck* v. *Garment Center*, 20 N. Y. Supp. (2d) 521, 259 App. Div. 691 (1940), the unsuccessful plaintiffs were a watchman and a carpenter. Elevator operators were mentioned among the other employees and the opinion of the court appears to apply equally to them. *Robinson* v. *Mass. Mut. Life Ins. Co.*, 158 S. W. (2d) 441 (1941), held the Act inapplicable to other maintenance employees and *Johnson* v. *Filstow, Inc.*, 5 W. & H. Rep. 286 (So. D. Fla. Mar. 30, 1942) held the Act inapplicable to a janitor.

within the Act.[10]. This result accords with Congressional intention.[11]

In fact Petitioner has been unable to find authority of any kind relevant to the interpretation of the words "in commerce" that would support the Administrator's contention that the elevator operators here should be brought within that category, with the exception of course of the opinion of the Court below. That opinion however treats the matter only by an *ex cathedra* statement contained in a footnote and supported by no reasoning or authority. The Second Circuit in the *Arsenal* case did not venture to express such a novel view and Judge Woolsey left no doubt of his disapproval when he decided the case in the District Court. He stated that the elevator operators, "if considered as engaged in any commerce, * * * were engaged in a vertical intrastate commerce and could not have been considered to have been engaged in interstate commerce in any proper sense."

In his brief in the Court below,[12] the Administrator cited a number of cases that have declared the activities there considered to be within interstate commerce. It is noteworthy that all of these cases involved activities integrally related to the functioning of organizations or

[10] *Rauhoff* v. *Gramling*, 42 F. Supp. 754 (E. D. Ark., 1941); *Gibson* v. *Glasgow*, 157 S. W. (2d) 814 (Tenn. Supreme Ct. 1942); *Cf.*, *Wagner* v. *United Dividend Corp.*, Colo. Dist. Ct. 5 W. & H. Rep. 138 (1942); *Porter* v. *Wilson*, 5 W. & H. Rep 152, F Supp. (No Dist Tex., 1942); *Veazey Drug Co.* v. *Fleming*, 5 W. & H. Rep. 60, F. Supp. (W D. Okla., 1941); *Contra*, where work is integrally related to the business of an interstate carrier, *Elam* v. *Wolberg*, Tenn. Chanc. Ct., 1942, 5 W. & H. Rep. 136; and *Tapp* v. *Price-Bass*, Tenn. Chanc. Ct., 1942, 5 W. & H. Rep. 155.

[11] See Hearings, p. 42, where this problem of local truckers is explicitly considered. Also to be noted is Congressional desire not to include persons who are fortuitously related to interstate commerce and would be within the scope of Congressional power. Thus, "For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States." (Senate Report No. 884, July 8, 1937, explaining the bill reported to and passed by the Senate)

[12] Administrator's Brief in the Circuit Court of Appeals, at pp. 39-43.

instrumentalities engaged as carriers of interstate or foreign commerce. Most of them involve loading and unloading of goods in railroad freight yards;[13] on ocean-going vessels;[14] and in railroad passenger stations.[15] In all these cases great interstate carrying systems were involved.

The remaining cases,[16] involving carrier businesses designed for the sole purpose of taking custody of interstate goods and carrying them for hire for part of their journey, were cited to establish a proposition which no one disputes:

> "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction."[17]

The contrast between such facts and those here involved could hardly be more striking. The elevators here in question are merely part of the service furnished by a

[13] *Union Stock Yard Co.* v. *U. S.*, 308 U. S. 213 (1939); *B. & O. S. W. R. R.* v. *Burtsch*, 263 U. S. 540 (1924); *Erie R. R.* v. *Shuart*, 250 U. S. 459 (1919).

[14] *Puget Sound Co.* v. *Tax Comm.*, 302 U. S. 90 (1937).

[15] The "red cap cases" under this Act: *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434 (E. D. Mo., 1941); *Williams*, v. *Jacksonville Terminal Co.*, 35 F. Supp. 267, (D. C. Fla., 1940), affirmed on other grounds, 118 F. (2d) 324, affirmed by this Court March 2, 1942, 86 L. Ed. Adv. Ops. 598. *Pickett* v. *Union Terminal* was a companion case. It was stipulated by counsel that the "redcaps" were "in commerce" and the point was not discussed by the Court.

[16] *The Daniel Ball*, 10 Wall 557 (1870), steamship operating within a state on navigable water of the United States, carrying goods destined for another state. *Thompson* v. *Daugherty*, 40 F. Supp. 279, (D. C. Md., 1941); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742, (W. D. Va., 1941); and *National Labor Relations Board* v. *Carroll*, 120 F. (2d) 457 (C. C. A. 1st 1941), applying the Fair Labor Standards Act and the National Labor Relations Act to *carriers of U. S. mail*, operating within a single city.

[17] Quoted by the Administrator in his Brief in the Circuit Court of Appeals at p. 40 from *The Daniel Ball*, 10 Wall 557. at p. 565.

landlord. In fact their operation is only one among various activities performed by the particular employees involved.

Since the elevators furnished by the Petitioner for the convenience of its tenants are merely the means whereby the tenants' goods are raised from the ground floor to other floors in the building, or *vice versa,* it could be argued with equal force that the stairway or fire escape, over which the tenants' goods might be carried, are instrumentalities of interstate commerce and that the janitor who sweeps the stairs is "in commerce". Obviously that is not the law. If the Administrator's contention is upheld, then every elevator operator in every building, whether he carries passengers or freight in his car, is likewise engaged in interstate commerce. There can be no distinction between carrying in an elevator a parcel which has arrived from another state, as in the present case, and carrying persons who have just arrived from another state or the United States mail carrier who is engaged in delivering letters which have arrived from outside the state.

V

PETITIONER IS EXEMPTED FROM THE WAGE AND HOUR PROVISIONS OF THE ACT AS A SERVICE ESTABLISHMENT, UNDER SECTION 13 (a) (2).

Even if this Court should conclude that, despite the grounds already advanced, the Act applies by its terms to the Petitioner's employees, they are nevertheless exempted from the wage and hour provisions of the Act by virtue of Section 13 (a) (2), which provides as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to * * * any employee engaged in any * * * service establishment the greater part

of whose * * * servicing is in intrastate commerce; * * *."[1]

The only argument that has been advanced for holding Petitioner liable under the Act is the fact that it furnished certain services[2] to tenants of its building, a transaction which could hardly be more localized or intrastate in character. It is clear therefore that the Petitioner comes within the exemption, unless some unusually constricted meaning is to be placed upon its terms.

(1) The building service cases.

This was the view of Judge Woolsey in the District Court opinion in the case of *Fleming* v. *Arsenal Building Corporation and Spear & Company, Inc.*[3] There it was held, on facts substantially identical to those involved in the instant case, that Section 13 (a) (2) exempts from the provisions of Sections 6 and 7 of the Act the maintenance and service employees of a loft building, space in which is rented to tenants engaged in the manufacture of goods for interstate commerce. Judge Woolsey stated:[4]

> "It seems to me, however, although I am aware that a different view has been taken by Judge Kirkpatrick of the District Court, Eastern District of Pennsylvania, in the case of *Fleming* v. *A. B. Kirschbaum Company*, 38 F. Supp. 204, decided during the trial of this cause, that the real question in this cause is whether or not the facts show that the defendants are *'service establishments'* within the exception contained in Section 13 (a) (2) of the Fair Labor Standards Act of 1938.
>
> "This cause was tried with the utmost thoroughness. Five days were occupied in the trial. It seemed

[1] Section 13 (a) (2) speaks of "retail" as well as service establishments. That part of the provision has been omitted above to show more clearly the Petitioner's ground for invoking this subsection.

[2] See Statement, pp. 5-6, *supra*.

[3] 38 F. Supp. 207 (1941).

[4] 38 F. Supp. 207, 212 (1941).

> to me, as the trial progressed, that the Government had, in its attempt to tie up the employees of the defendants with *'production of goods for commerce'* proved beyond any peradventure that the defendants, Arsenal Building Corporation and Spear & Company, Inc., as its agent, were *'service establishments,'* all of whose servicing was in intrastate commerce, and I so find."

This decision was reversed by the Second Circuit; and the exemption has likewise been refused in the instant case by both the District Court and the Circuit Court. The reasoning of these three opinions, however, is in great confusion, and is not supported by other judicial authority.[6]

The District Court below conceded that Petitioner is engaged in servicing—

> "Unquestionably, most if not all of the work done by the employees in this case could be properly described as servicing."

But it nevertheless held that the Petitioner did not operate a "service *establishment*" because it was not primarily engaged in rendering service, but was primarily a landlord. Judge Kirkpatrick also suggested that perhaps Petitioner operates a manufacturing establishment instead of a service establishment (R., pp. 179-180).

The Circuit Court below approved the District Court's reasoning that Petitioner was primarily a landlord and therefore not a service establishment. It also, however,

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[5] 125 F. (2d) 278 (1941).

[6] These are the only building service cases dealing with the exemption. All other such cases have held the Act inapplicable, and have therefore not had to face the service exemption question. *Cecil* v. *Gradison, supra; Merryfield* v. *Hoyt Shoe Corp., supra; Killingbeck* v. *Garment Center Capital Inc., supra; Robinson* v. *Massachusetts Mutual Life Insurance Co., supra;* and *Johnson* v. *Filstow, Inc., supra.* The opinion in the *Cecil* case strongly suggested, however, that this exemption was applicable (see Petition for Writ of Certiorari, p. 58).

based its holding (and seemingly with greater assurance) upon the theory that to come within the service exemption, services must be of a retail nature and must therefore be sold to non-commercial users (R., pp. 220-222).

The Second Circuit in the *Arsenal* case left open the question whether a loft building operator ran a service establishment but denied the exemption on the ground that the servicing was not intrastate in character.[7]

The primary business test as laid down by Judge Kirkpatrick and approved by the Court below, *viz.*, that the Petitioner was primarily engaged in the leasing of space and thus not a service establishment, has no proper application in this case, however it may be elsewhere. In the first place, the premise is doubtful. The leasing of space itself is properly to be classed as the rendering of a service. Even the Administrator concedes this. In his Interpretative Bulletin No. 6,[8] he includes hotels and tourist houses among service establishments exempted from the Act.

Moreover, it is difficult, if not impossible, in practice ever to separate the rental of building space from the furnishing of maintenance service. In business buildings as well as in apartment houses, it is customary for a landlord to furnish maintenance and services of various sorts. To say that the space is more important than the other services is like saying that the length of a rectangle is more important than the width.

The second basis of the decision of the Circuit Court below was that servicing must be retail and that to be retail it must be furnished to non-commercial customers. In this connection the Court stated:[9]

> "In reaching our conclusion we have given weight to the fact that the exemption as to service establishments was added by the conference report to the

[7] *Fleming* v. *Arsenal Building Corporation*, 125 F. (2d) 278 (1941).

[8] 4 W. & H. Rep. 315, 318.

[9] R., p. 221.

exemption as to retail establishments already contained in subparagraph (2) of Section 13 (a) of the bill. From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activity of which is to furnish service to the consuming public."

The implied premise that Congress intended even the word "retail" to be limited to transactions with non-commercial consumers is of doubtful validity. An earlier form of Section 13 (a) (2) was limited to "retail" business but was apparently intended to include business done with commercial customers.[10]

We may put these preliminary objections to one side, however, for it would seem patent that Congress meant something other than retail when it used the additional word "service."

(2) The language of Section 13 (a) (2).

The language of Section 13 (a) (2) itself certainly suggests that "service" means something additional to "retail." The word hardly appears to be surplusage; and in fact it was deliberately added by the Conference Committee to a version that mentioned only "retail" business.

Yet the Administrator contends that Section 13 (a) (2) should be interpreted as if it had said simply "retail establishments" or perhaps "service and other retail establishments." It was pointed out by the Administrator and the Court below that some of the other exemptions of Section 13 involved industries that render serv-

[10] See discussion of the legislative history, p. 84, note 11, *infra*. Courts have rejected the supposed "non-commercial" limitation as to retail establishments. See pp. 85-86, *infra*.

ice. From this it was reasoned that Section 13 (a) (2) does not include services in general but only retail services. To this tenuous argument, two conclusive answers may be given. First, Congress knew how to say "retailing" when it meant only retailing. One need only look to Section 13 (a) (1), which exempts anyone employed in a "local retailing capacity." Secondly, no one would expect a long list of exemptions to be mutually exclusive categories. Here again, one may compare Section 13 (a) (1) and 13 (a) (2).[1] Congress was fully aware that in many instances exemptions would overlap.[2]

The root of the Administrator's error is his failure to recognize the underlying purpose of Section 13 (a) (2). He has seen "retail" and "service" grouped together in the same statutory clause. He has guessed that they have something in common. They do indeed. But the common denominator is not reached by cancelling out one of the terms. Rather it is found in the common modifying clause, "the greater part of whose sales or servicing is in intrastate commerce." The exemption, in other words, was intended to cover predominantly *local* business. This is made clear by a consideration of the relevant legislative history.

(3) The legislative history of Section 13 (a) (2).

The explicit exemption did not appear until near the close of the year of Congressional deliberation of the Act. But from the very inception of the legislation, great concern was expressed that the Act, for constitutional as well as other reasons, should not extend to retail and

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[1] Indeed Section 13 (a) (2) itself was inserted in the Act only to ensure a result which was thought by many to follow from the general provisions of the Act. See pp. 81-85, *infra*.

[2] See for example statement in the House of Committee Chairman Norton: 83 Cong. Rec., p. 9257:

> "These general exemptions, to a certain extent overlap the specific exemptions, and so there can be no question but that all meritorious cases are covered in some cases twice."

other predominantly local businesses. The concern not to touch local business may be found even in the President's message to Congress on May 24, 1937, which initiated consideration of legislation for governmental control over minimum wages and maximum hours of employment. In that message[1] the President stated:

> "Although a goodly portion of the goods of American industry move in interstate commerce and will be covered by the legislation which we recommend, there are *many purely local pursuits and services* which no Federal legislation can effectively cover." (Italics supplied.)

At the outset of the Joint Hearings on the first draft bills, it was explained by the Honorable Robert H. Jackson, then Assistant Attorney General, that there was no intention to reach service and other local businesses:

> "* * * generally speaking the policy of the bill is not to include the service trades *and* small businesses *and* the retail enterprises."[2] (Italics supplied.)

To emphasize this point, Mr. Jackson added that the purpose of the legislation was to leave

> "to the State and local communities themselves the power of regulating the small business units that affected the local community only."[3]

Congressional leaders were keenly interested in this aspect of the proposed bill, and it was necessary for Mr. Jackson to repeat this assurance several times:

> "* * * but, as I said at the outset under Senator Black's question, it is not intended by this bill to.

[1] Quoted in the Report of the Senate Committee on Education and Labor to accompany S. 2475, 75th Cong., 1st Sess., Senate Cal. No. 905, Report No. 884.

[2] Hearings, p. 35.

[3] Hearings, pp. 35, 36.

affect the retail trades or the service trades. It is intended to catch the unfair labor practices at the point of production."[4]

The matter was carefully discussed in the report of the Senate Committee on Education and Labor which accompanied and recommended passage of S. 2475, as amended.[5] That report stated:[6]

"The bill carefully excludes from its scope *business* in the several States that is *of a purely local nature*. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. *It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce.* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States." (Italics supplied.)

On July 27, 1937, Senator Black in his capacity as Chairman of the Committee on Education and Labor of the Senate, discussed the proposed Senate bill by outlining its provisions in general. At the outset he made clear that there was no intention of regulating local business units. He said:[7]

"The general purpose of the bill legislatively speaking, is a three fold one:

[4] Hearings, pp. 39, 40. Senator Black (now Mr. Justice Black), was then Chairman of the Senate Committee in charge of the bill.

[5] This bill passed the Senate on July 31, 1937.

[6] Senate Report No. 884, 75th Cong., 1st Sess., p. 5.

[7] 81 Cong. Rec., p. 7648.

"It provides a method of obtaining the objectives of minimum wages and maximum hours in industries throughout the Nation which engage in the transportation of *their* goods in interstate commerce. It is not intended to, and does not, attempt to provide by Federal legislation the fixing of minimum wages and maximum hours of employment in all the varied *peculiarly local business units* of the Nation." (Italics supplied.)

This same idea was reiterated and emphasized a few paragraphs later, where he said:[7]

"So the bill, insofar as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated, to goods which are actually manufactured for transportation and are transported in interstate commerce. We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours *in the various service employments* throughout the Nation.

"That is done for two reasons. In the first place, the bill rests squarely upon the interstate commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee, if not the unanimous sentiment of the committee, *that businesses of a purely local type which serve a particular local community,* and which do not send their products into the stream of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate." (Italics supplied.)

Neither the original bills nor that passed by the Senate[8] contained an express exemption for local business, however. Such an explicit provision appeared for the first

[7] 81 Cong. Rec., p. 7648.

[8] S. 2475 as passed by the Senate July 31, 1937.

time in the bill passed by the House,[9] which saved from the coverage of the Act "any retail industry the greater part of whose sales is in intrastate commerce." This proviso was written into the House bill as the result of an amendment proposed by Representative Celler from the floor of the House on May 24, 1938.

While this amendment was accepted almost immediately, the reason for its ready acceptance in the House bill and later, in expanded form, in the Conference bill is not far to seek. The explanation undoubtedly is to be found in the case of *Santa Cruz Fruit Packing Company* v. *National Labor Relations Board*, 303 U. S. 453, decided March 28, 1938, approximately two months before the House amendment was offered. It will be recalled that that case decided for the first time that the commerce power of Congress might attach to an employer less than 50% of whose business involved interstate commerce. Thus, there was reason to make explicit the policy of the Act that it should not apply to businesses "the greater part" of whose activities are intrastate. It might be presumed that a Congress highly conscious of the constitutional issues raised by the Act would be aware of a case so important as the *Santa Cruz* case, but presumption is unnecessary. The record discloses discussion of the case on the floor of both the House and Senate.[10]

It is clear enough that Representative Celler was primarily interested in safeguarding retail business; and his amendment was limited to "retail industry."[11]

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[9] S. 2475 as passed by the House May 24, 1938.

[10] In the House, in the discussion on May 24, 1938, immediately preceding passage of the Celler amendment. 83 Cong. Rec. at pp. 7334 and 7384. The Celler amendment appears at pp. 7437-38. Representative Celler gave as his view, based on many years experience at the bar, that the (then) latest Supreme Court cases would bring retailing within the commerce power. The *Santa Cruz* case was also brought to the Senate's attention during discussion of the Conference Report, June 14, 1938. 83 Cong. Rec., p. 9173.

[11] Representative Celler apparently intended the word "retail" to cover a great deal more than is conceded by the Administrator, however. His amendment, even in this narrower form, was supposed to make clear the exemp-

The Conference Committee broadened the exemption into its present form. The change was not left to go unnoticed. The report of the Conference bill given the House by its conferees gave this explanation:[12]

> "Section 13 of the conference agreement contains the same exemptions as were contained in the House amendment with the following *changes and additions:* (1) It includes an exemption from both the wage and hour provisions of employees of retail or service establishments the greater part of whose business is in intrastate commerce, * * *." (Italics supplied.)

In the light of this explanation of the change from the House version, the conclusion of the Third Circuit that the "service" referred to in Section 13 (a) (2) must be retail in character seems hardly tenable.

(4) Judicial authority.

Although the Administrator's position receives support in scattered *dicta* in a few cases, Petitioner has been unable to discover any cases aside from the one at bar where the exemption has actually been denied on the ground that the services were for non-commercial customers. In fact, it has been held that even in the case of a *retail* establishment the exemption applies notwithstanding the fact that the customers are commercial consumers.

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tion from the Act, *inter alia*, of local sales, even if furnished to commercial consumers. He mentioned building contractors "doing a purely local business" as among those he wished to cover by his amendment. 83 Cong. Rec. 7394, May 24, 1938. Even before the Celler amendment was adopted, it was understood that the bill would not touch local industry. Thus, it was stated by Representative Kitchens shortly before the passage of the Celler Amendment that:

> "In fact, the bill excludes every worker in intrastate business of all kinds, such as work in laundries and other local factories and business not doing an interstate business." 83 Cong. Rec. p. 7412, May 24, 1938.

[12] Conference Report to accompany S. 2475, H. R., 75th Cong., 3rd Sess., Report No. 2738, p. 32.

Thus, in *White Motor Company* v. *Littleton,* 124 F. (2d) 92 (1941), the Court stated:

> "The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were preponderantly retail although the products sold were used subsequently for commercial purposes."

And in *Super-Cold Southwest Co.* v. *McBride,* 124 F. (2d) 90 (C. C. A. 5th, 1941), the Court, although holding the exemption inapplicable on the facts presented, left no doubt of its disapproval of the Administrator's contention. Thus, it stated:

> "The Act is unambiguous and operates to exempt all those coming within its terms and those terms cannot be enlarged or diminished by rulings of the administrator, such as that, because sales are made to commercial instead of to private users they are not sales at retail.
>
> "If therefore defendant were otherwise a retail dealer, we should hold it exempt though the retail sales were made to commercial rather than to private users."

Similarly the courts have applied the exemption to those who service commercial customers. In fact the most recent decision involving the service exemption was just such a case, viz., *Beatty* v. *Foutz Tool Co.,* F. Supp. , 5 W. & H. Rep. 259 (S. D. Cal. Mar. 23, 1942), involving a machine shop.

The only cases cited by the Administrator in his Brief in the Circuit Court wherein the exemption was refused involved employers engaged in the manufacture or production of goods.[1] It is not surprising therefore that the

[1] Thus, the Administrator in his Brief in the Circuit Court of Appeals at p. 49, cited *Wood* v. *Central Sand & Gravel Co.,* 33 F. Supp. 40 (W. D. Tenn. 1940); *Muldowney* v. *Seaberg Elevator Co.,* 39 F. Supp. 275 (E. D. N. Y. 1941); *Fleming* v. *Tidewater Optical Co.,* 35 F. Supp. 1015 (E. D. Va. 1940);

Administrator has attempted to demonstrate that the Petitioner operates "an establishment devoted to manufacturing." In order to reach this result, the Administrator has had to make the astonishing contention that the word "establishment" refers not to a business enterprise but to a physical structure. Thus, he asserted in his Brief in the Circuit Court that:[2]

> "Kirschbaum's employees do not work in a 'service establishment'; they work in an establishment devoted to manufacturing."[3]

The words of the Act clearly preclude such a construction. By the word "establishment," Congress intended to refer to a business unit, not a physical structure. It is only a business unit, and certainly not a building itself, that can engage in "servicing" or "selling."

Even the Administrator himself in his Interpretative Bulletin No. 6, repeatedly uses the word "enterprise" as equivalent to "establishment."[4] In fact he concedes that independent ownership of a particular business unit will usually be the determining consideration in ascertain-

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and *Boyhan* v. *Liden Manufacturing Co.*, 4 W. & H. Rep. 158 (C. C. Mich. Ingham Co. 1941). The Administrator also cited *Stucker* v. *Roselle*, 37 F. Supp. 864 (W. D. Ky. 1941), involving a hat cleaning establishment, and *Labates* v. *Interstate Co.*, 4 W. & H. Rep. 91 (W. D. Tenn. 1941), involving a restaurant, both of which held that the exemption applied.

[2] Administrator's Brief in the Circuit Court of Appeals, p. 50.

[3] At p. 50 in his Brief in the District Court he stated:

> "Since defendant's building is devoted exclusively to manufacturing activities, it is a manufacturing establishment".

[4] Thus, for example, in Interpretative Bulletin No. 6 issued December 7, 1938, and revised June 16, 1941 (4 W. & H. Rep. 315, 319, 320), the Administrator states: "A determination of the meaning of the word 'establishment' in Section 13 (a) (2) is necessary not only in order to decide whether an *enterprise*, or portion thereof, is within the exemption but also to ascertain whether the provision of the exemption, requiring that the greater part of the selling or servicing of an establishment be in intrastate commerce, has been satisfied." (Italics supplied).

ing whether it is a retail or service "establishment." Thus he states:[5]

> "The unit store will ordinarily constitute the retail or service 'establishment' contemplated by the exemption, even though it may be operated as a concession in a hotel, railroad station, or general market. In such cases, the structure of the enterprise is relatively simple and *the independent ownership of the particular store or shop will usually be the determining consideration.*" (Italics supplied.)

In support of his contention that the Petitioner is engaged in a manufacturing enterprise, the Administrator cited the case of *Barfoot* v. *White Star Line*, 170 Mich. 349.[6] A more inapposite precedent could hardly be supplied. That case involved a statute imposing a duty on the owner, agent or lessee to install elevator safety gates in any "manufacturing establishment, work shop, hotel or store." From the wording of the statute as well as its objective, it is obvious that the Michigan legislature was referring only to the physical place in which the installation was to be made. And the Michigan Supreme Court, in deciding the case, was careful to indicate that its construction of the word "establishment" was influenced by this fact rather than any general definition of the word. Thus the Court stated that it construed "the words 'manufacturing establishment' as meaning, *in the particular section we are considering*, premises in or on which a manufacturing business is conducted." (Italics supplied.)

If there be any doubt as to whether the Petitioner engages in manufacturing or any need to determine that fact by reference to judicial authority, the question is decided in the negative in *Commonwealth* v. *Arrott Mills Co.*, 145 Pa. 9 (1891). In that case the defendant corpora-

[5] Interpretative Bulletin No. 6, 4 W. & H. Rep. 315, 320.

[6] Brief in the Circuit Court of Appeals, p. 50.

tion owned buildings in the City of Philadelphia which it leased to persons engaged in manufacturing. In each building it operated a steam engine and boilers which were connected with a system of shafting, running into the rooms used by the tenants for manufacturing. The lower court decided that the defendant was not engaged in manufacturing, stating that so far as the defendant was concerned its transaction with regard to steam was closed when it sold the space and steam to others and received its price therefor, all of which was before actual manufacturing began.[7] "Here, one person owns merely the building, engine and shafting; another owns the raw material, the machinery directly employed in production, the finished product, the profits, and the good-will. If the former is engaged in manufacturing, in the same sense as is the latter, so is any landlord who rents a building in which manufacturing is carried on by his tenant, and so is any person who sells coal for the manufacturer's engine, or raw material for any state of the process." This conclusion was upheld by the Pennsylvania Supreme Court, which reiterated that defendant was merely a landlord supplying its tenants with steam power in order to rent its buildings. "It is not a manufacturer or producer of anything * * *"

(5) Petitioner's servicing is unquestionably in intrastate commerce and the exemption should be given effect.

It would be hard to imagine an activity which should more surely be characterized as intrastate than the servicing which is supplied by the Petitioner. In the opinion in the District Court in this case, Judge Kirkpatrick conceded: "* * * that renting buildings, the industry in which this employer is engaged, is not an 'industry en-

[7] The categorization of defendant's business in the *Arrott Mills* case, is apposite to the instant case; for there, as here, the statute involved was based upon economic function (tax statute) rather than physical operations (safety statute in *Barfoot* case, *supra*).

gaged in commerce or in the production of goods for commerce' ".[1] And in the District Court opinion in the *Arsenal* case, Judge Woolsey stated that: "It is difficult, if not impossible, to imagine a more localized employment than the maintenance and operation of a loft or office building."[2]

There is no suggestion in the opinions either of the District Court below or of the Third Circuit, nor indeed even in the briefs for the Administrator in either Court, that the servicing of Petitioner would not satisfy the requirement of Section 13 (a) (2) as to being intrastate. It is only in the light of the astonishing conclusion of the Second Circuit Court in the *Arsenal* case that it is necessary to rebut such a view. The entire reasoning of the Second Circuit on this point is to be found in the two succeeding sentences:[3]

> "It cannot be that if the exemption extends beyond retail 'servicing', it is the character of the 'servicing' itself that counts, divorced from the 'production' of which it is a part. Again, we should be met by the anomaly arising from such an interpretation, the capricious incidence of the act resulting from the accident of the industrial division of the whole process."

In other words, any activities separately conducted which *might* be performed by one large industrial corporation will be treated as if they actually were so performed. It does not require extended analysis to see that this reasoning would not only eliminate the service exemption of the Act:[4] It would also do away with all

[1] R., p. 178.

[2] 38 F. Supp. 207, 212.

[3] 125 F. (2d) 278, 280.

[4] It should also be noted that the Second Circuit is saying that if services are "necessary to production" they are automatically removed from the sphere of the exemption of Section 13 (a) (2). It is obvious, of course, that the exemption in such a case becomes meaningless.

limitations upon the coverage of the Act and indeed with all limitations upon Congressional power under the Commerce clause. One can hardly conceive of any activity, however small or however localized, which could not be performed by some huge interstate corporation. Thus the reasoning of the Second Circuit like that of the Courts below must be rejected and Section 13 (a) (2) should be applied as its language and legislative history require.

The Circuit Court below apparently realized that it was really adopting an abnormal and highly constricted interpretation of Section 13 (a) (2). Such an interpretation it sought to justify on the ground that that subsection "* * * represents a special exception to the general coverage of the Act" (R., p. 221). The examination of the actual legislative history, however, has shown that the retail and service exemption was not of this nature. It was no "special exception." It was included to make absolutely certain that a fundamental purpose of Congress should be achieved; that is, that predominantly local activities should not be included in the Act. Thus, if any canon of construction is indicated it should be a broad one, sympathetic to Congressional intention not to touch local activities.

The courts have been careful to point out the danger of disregarding this Congressional purpose. Thus in *Collins* v. *Kidd*, 38 F. Supp. 634 (E. D. Tex., May 1, 1941), the exemption was applied to a retail establishment operating an ice business despite the fact that the retailer manufactured the ice. In so holding, the Court emphasized the necessity of giving effect to Congressional intention that enumerated areas be exempt from the Act. It stated:

> "There is no way of rendering a law unpopular and causing it to be repealed or modified so readily as to extend its purpose beyond the scope of those to whom it was originally intended to apply. To

make a law unreasonable is to make it unpopular, and to make it unpopular is to destroy it. In the very interest of those concerned with the preservation and development of the Fair Labor Standards Act, we can see but one solution, and that is to hold that retailers and agricultural employees and others mentioned in the exemption must be exempt as the Act so provides."

The mere fact that the Administrator has taken a particular position in an Interpretative Bulletin is of course not conclusive.[5] He has no power to define the meaning of terms used in Section 13 (a) (2) as he does under Section 13 (a) (1) which exempts employees engaged in a "local retailing capacity." As stated by the Court in *Duncan* v. *Montgomery-Ward*, 42 F. Supp. 879, 883 (S. D. Tex., Dec. 16, 1941):

"Due deference should, of course, be paid by the Courts to the Rulings of the Administrator, but where, as here, the words of the Congress and the provision of the Act defining a retail establishment are clear, plain, and unambiguous, such provisions should not be enlarged or diminished either by the Rulings of the Administrator or the Court."

Moreover, the Administrator has estopped himself from any claim to respect for his opinion that any particular situation is covered by the Act, for he has admitted that he resolves all doubts in favor of coverage.[6] Thus, where the Administrator interprets the law *not* to apply, his opinion is presumptively correct. But where he interprets the law as applicable little or no weight should be given his opinion as such.

[5] See also *Super-Cold Southwest Co.* v. *McBride*, *supra*, p. 86.

[6] See Interpretative Bulletin No. 1 (W. & H. Manual 1941, p. 28).

The real nature of the interpretations issued by the Administrator was clearly perceived in the case of *Womack* v. *Consolidated Timber Co.*, F. Supp. , 5 W. & H. Rep. 10 (D. Ore. 1941). The Court's language, in upholding the exemption on the facts there presented, is highly illuminating:

> "Influenced by such considerations, the Administrator has previously taken an opposite position. During the pendency of this case and owing apparently to developments in this controversy, the former ruling was repudiated, notwithstanding the fact that certain courts had made the previous pronouncement the basis for decision, Labates *v.* The Interstate Company [1941 W. H. Manual 624], opinion January 29, 1941, Western District Tennessee, Western Division.
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> * * *
>
> "In the nature of things the administrative agency is impressed with the remedial nature of the Act and the urge to carry out the general purpose of Congress. On the other hand, the court is of opinion that exemptions wisely placed in such legislation should be enforced for the protection of the public at large against bureaucratic regulations of matters entirely local in character, such as the purveying of food, to the end that conditions such as those denounced in *Schechter* v. *United States*, 295 U. S. 495, shall not again prevail."

These cases support the view of Petitioner that the plain meaning and purpose of Section 13 (a) (2) should not be frustrated by the interpretation of an over-zealous administrator. There is no occasion to cloud the meaning of the Act with strained ambiguities and then to resolve them with unjustified presumptions. In short, Petitioner fulfills the terms of the exemption extended by Congress to service establishments and should be recognized as such by this Court.

VI

IF THE ACT BE HELD APPLICABLE TO PETITIONER'S MAINTENANCE AND SERVICE EMPLOYEES, IT WOULD CONTRAVENE THE 10TH AMENDMENT TO THE CONSTITUTION.

In sustaining the validity of the Act, this Court, in the case of *United States* v. *F. W. Darby Lumber Company*, 312 U. S. 100 (1941), upheld the power of Congress to prohibit the shipment in interstate commerce of goods produced under substandard labor conditions.[1] It was held that as a means reasonably adapted to the attainment of that end, Congress might directly regulate the wages and hours of employees actually engaged in the production of goods for such commerce where their employer is himself engaged in the production for and shipment in interstate commerce of such goods.

It is noteworthy that nowhere in the Court's opinion is there to be found any suggestion that the intrastate activities which are regulated may have anything less than a real and substantial effect upon interstate commerce. On the contrary, this Court repeatedly noted in its opinion that it was applying the Act to "*an employer engaged* * * * *in the manufacture and shipment of goods* in filling orders of extrastate customers * * *";[2] to the actual "*production of goods*, which, at the time of production, the *employer* * * * intends or expects to move in interstate commerce * * *";[3] and to "*one who employs persons* * * * to work on goods which *he* ships or expects to ship across state lines * * *."[4] On the facts there presented, involving the application of the Act to such an employer, a proper exercise of the power to "regulate intrastate activities

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[1] Section 15 (a) (1) of the Act.

[2] *United States* v. *F. W. Darby Lumber Co.*, 312 U. S. 100 at p. 117.

[3] *Id.* at p. 118.

[4] *Id.* at pp. 125-126 (Italics supplied throughout).

where they have a *substantial effect* on interstate commerce'"[5] was found to exist.

Such an application of the Act therefore clearly falls within the proper limits of the commerce power as they have been expressed in the very cases which were considered by Congress to supply the chief legal basis for the Fair Labor Standards Act. Thus in *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1 (1937), this Court stated:

> "Although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation* to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corporation* v. *United States*, *supra*. *Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id.* The question is necessarily one of degree." (Italics supplied.)

And likewise in *Santa Cruz Fruit Packing Company* v. *National Labor Relations Board*, 303 U. S. 453, 466-467 (1938), it was said:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a *close and substantial relation* to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this

[5] *Id.* at p. 119 (Italics supplied).

principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States*, 295 U. S. 495, 546. *'Activities local in their immediacy do* not because interstate and national because of *distant repercussions.' Id.*, p. 554." (Italics supplied.)

The present case must be strongly contrasted with the facts brought before this Court in the *Darby* case, and Petitioner contends that here, where the employer is *not* engaged in production and the employees render services which at most can only be considered as indirectly affecting the production of goods by a third person, a construction holding the Act applicable would transgress the Tenth Amendment, which reserves to the states the powers not delegated to the Federal Government.[6]

Even the cases decided after the passage of the Fair Labor Standards Act, which have involved the power of Congress to regulate intrastate activities, do not justify an application of the Act to the Petitioner in the case now presented. Two cases in particular should be noted, as representing the limits of authority to which the Administrator may look for comfort in an effort to sustain his novel position.

In *Consolidated Edison Company of New York, Inc., et al.* v. *N. L. R. B.*, 305 U. S. 197 (1938), it was held that the National Labor Relations Act could constitutionally extend to an industry, which, viewed apart, was wholly intrastate and all of whose sales were of that

[6] Petitioner does not, and did not in the Court below, contend that the Tenth Amendment is more than the explicit statement of what was already implied by a constitution of delegated powers. This Court made that clear in its opinion in the case of *United States* v. *Darby Lumber Company*, *supra*.

character. However, merely to note the facts that were enumerated in the opinion of the Court to tie the Consolidated Edison Company to interstate commerce is sufficient to distinguish that case from the one here presented. The Court noted in detail the almost complete dependence upon the Company of the most important instrumentalities of interstate commerce and even of the Federal Government itself in the New York metropolitan area.

In *N. L. R. B.* v. *Benjamin Fainblatt, et al.*, 306 U. S. 601 (1939), the National Labor Relations Act was held applicable to a manufacturer who produced goods which were shipped in interstate commerce. Since interstate commerce was involved in the transportation of the goods across state lines directly to and from the manufacturer's plant; and since it was found that the manufacturer's unfair labor practices directly led or would lead to labor disputes interfering with the free flow of that commerce, the Court held that it was within the power of Congress to protect such commerce from interruption by prohibiting the practices complained of.

In both the *Consolidated Edison* case and the *Fainblatt* case, it clearly appeared that the intrastate activities of the companies involved had such a close, direct and substantial relation to interstate commerce that an interruption of those activities would immediately affect such commerce. In those cases, the permitted end was the prevention of activities which stopped or tended to stop the flow of interstate commerce. The constitutionality of the wage and hour provisions of the Fair Labor Standards Act was not, however, upheld on the theory that Congress was attempting to prevent activities which caused a stoppage of commerce; but on the ground that the fixing of wages and hours of employees directly functioning in the production of goods for interstate commerce for an employer so engaged, was a reasonable means of attaining the permitted end, *viz.*, the prohibition of shipment in interstate commerce of goods produced under sub-standard labor conditions.

It is quite another thing, however, to say that a reasonable means to prohibit or stop shipment of goods in interstate commerce is the regulation of wages and hours of employees of an employer who is not engaged in such production or shipment and whose connection with interstate commerce is indirect to say the least. This the Administrator disregards. He appears to believe that he need only point to *some* connection, however tenuous, between interstate commerce and the employees he wishes to bring within his view of the Act.

The Administrator has even attempted to take the position that since the Act was upheld in the *Darby* case as a valid exercise of the commerce power, no question of a conflict with the Tenth Amendment can possibly arise. His contention is that since the *Darby* decision the only possible field left for inquiry and determination, no matter what the facts may be, is one of statutory construction.[7] But that the Act was upheld on the facts then presented to this Court does not mean that Constitutional questions respecting all possible applications of the legislation are automatically eliminated. This Court surely did not mean in the *Darby* case that any interpretation given to the words "engaged in the production of goods for commerce" by the Administrator or by a state or lower federal court would be constitutional.

As has already been indicated,[8] Constitutional considerations should be viewed primarily as an additional and compelling reason for adopting a construction placing Petitioner and its employees beyond the scope of the Act.[9] Congress did not intend to apply the Act beyond the limitation of its power under the commerce clause, and the construction advocated by Petitioner is thus the only one consistent with the basic intent of Congress in enacting the

[7] Administrator's Brief in the Circuit Court of Appeals, p. 52.

[8] Pp. 12-13, *supra*.

[9] Thus, these considerations were the primary basis for the adoption of such a construction by the Court in *Cecil et al., v. Gradison et al.*, p. 10, *supra*.

legislation. As has been stated by the District Court for the Western District of Tennessee in *Chapman* v. *Home Ice Company*, F. Supp. , 5 W. & H. Rep. 133 (W. D. Tenn., 1942):

> "If we are to preserve the identity of the State with reference to commerce, the line must be drawn as it was by the draftsmen of this Act and those things which only indirectly or remotely affect commerce must be considered and recognized as such. Congress has broad powers with reference to commerce and the right to limit strictly intrastate or local activities under certain conditions, but in doing so it cannot violate the Tenth Amendment to the Constitution which reserves to the States the power to regulate internal commerce, and it has not attempted to do so in the Act now under consideration. Congress has not sought here to invade the province of the States in the regulation of wages and hours under the Fair Labor Standards Act so as to take in indiscriminately local activities of the people * * *."[10]

This Court, in sustaining statutes that have gone to the very verge of the Constitution, has repeated over and over again that the subject-matter of Congressional power is still commerce, not manufacture nor production. Thus, in the *Darby* case, the Chief Justice noted that "manufacture is not of itself interstate commerce."

It is submitted that the Administrator and the Court below have ignored the warning so plainly given by this Court. They have read the Constitution as if it gave Congress the power to do all things necessary and proper to the regulation of "production." And this is not merely the conclusion we draw from the holding of the Circuit Court. It is a conclusion dictated by the plain

[10] See also *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689 (W. D. Okla., 1941); and *Fleming* v. *Peoples Packing Co., Inc.*, 42 F. Supp. 868 (W. D. Okla., 1942).

words of its opinion. It was enough to satisfy that Court that the employee services appeared "*convenient and appropriate*" to the maintenance of a something "*suitable*" for the manufacture of goods for commerce. (Italics supplied.)

The fundamental error of the Court below thus stands clearly revealed. It has assumed that the word "commerce" in Article I, Section 8, Clause 3 of the Constitution is equivalent to the word "production." It therefore held valid the application of the Act to Petitioner's employees because they were deemed necessary and proper to production.

We do not believe, as we have stated earlier, that Congress intended the word "necessary" in Section 3(j) of the Act to be interpreted as if it were a part of the general enabling clause of the Federal Constitution. But if such a construction cannot be avoided, we submit that this Court should declare to Congress that it has transcended its power under the Constitution.

CONCLUSION.

It is therefore respectfully submitted, for the reasons above set forth, that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed.

Respectfully submitted;

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APRIL 15, 1942.

APPENDIX.

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying

that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In

the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representatives may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reason-

able per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in deter-

mining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible

without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such

classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after

such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be con-

clusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provisions of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under sec-

tion 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propogating, processing, marketing, freezing, canning, curing, storing or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions

contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental de-

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

ficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section

or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not

Approved, June 25, 1938.

COPY

FEB 14 1942

No. 910

In the Supreme Court of the United States

OCTOBER TERM, 1941

A. B. KIRSCHBAUM COMPANY, PETITIONER,

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

CITATIONS

Cases:	Page.
Cecil v. *Gradison*, Ct. App. Ohio, 1st Dist., decided Nov. 17, 1941	2
Fleming v. *Arsenal Building Corp.*, C. C. A. 2d, decided December 30, 1941, pending on petition for writ of certiorari, No. 924, this Term	2
Killingbeck v. *Garment Center Capitol*, 259 App. Div. 691, 20 N. Y. S. (2d) 521	2
Merryfield v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794	2
Robinson v. *Massachusetts Mutual Life Insurance Co.*, (Tenn. Sup. Ct., Nov. 29, 1941)	2
Statute:	
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.*:	
Sec. 3	1
Sec. 6	1
Sec. 7	1
Sec. 13	2

443585—42

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The court below held that the Fair Labor Standards Act of 1938 applies to petitioner's employees, who are engaged in the maintenance and operation of a building whose tenants produce goods for interstate commerce. The two bases of the court's holding are, first, that such employees are engaged in "the production of goods for commerce" (Secs. 6, 7; Pet. 31, 33) since they are employed in a "process or occupation necessary to the production" (Sec. 3 (j); Pet. 27),[1]

[1] The court also held that the elevator operators, since "they carry out one step in the actual transportation of the goods to points outside the state," are directly engaged "in commerce" within the meaning of sections 6 and 7 (R. 219).

and, second, that the employees are not "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (Sec. 13 (a) (2); Pet. 41).

Although there is a conflict with decisions in three state courts and a federal district court,[1] the only other decision in a federal Circuit Court of Appeals is in accord on both points. *Fleming* v. *Arsenal Building Corp.*, C. C. A. 2d, decided December 30, 1941, pending on petition for writ of certiorari, No. 924, this Term (Pet. 46–53). However, the questions involved are of considerable significance in the application of an important federal statute. They directly affect the status under the Act of an estimated 75,000 custodial and maintenance employees. The questions also concern many additional thousands of employees whose work is asserted to be in a "service establishment," or who are engaged in a variety of processes necessary to the production of goods for interstate or foreign commerce, but who are em-

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[1] *Merryfield* v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794 (D. N. H. 1941); *Killingbeck* v. *Garment Center Capitol*, 359 App. Div. 691, 20 N. Y. S. (2d) 521 (1940); cf. *Cecil* v. *Gradison*, Ct. App. Ohio, 1st Dist., decided Nov. 17, 1941 (Pet. 53–58); *Robinson* v. *Massachusetts Mutual Life Insurance Co.* (Tenn. Sup. Ct., decided Nov. 29, 1941) (Pet. 58–65). In the *Arsenal* case, the Circuit Court of Appeals for the Second Circuit stated that "Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling" (Pet. 53).

ployed by someone other than the manufacturer. In sum, we submit that the court below has decided two important questions of federal law which have not been but should be settled by this Court.

For the reasons stated, the Government does not oppose the granting of the writ.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor,
United States Department of Labor.

FEBRUARY 1942.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	10
Argument	14
I. Petitioner's employees are engaged "in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Act	14
A. The applicability of Sections 6 and 7 depends solely upon the nature of the employee's activities	18
1. The statutory language	18
2. The legislative history	24
3. The decisions	30
B. Even under the "employer test" the employees here involved would be entitled to the benefits of Sections 6 and 7	34
C. The activities of maintenance employees such as those here involved constitute processes or occupations necessary to production within the meaning of Section 3 (j)	36
II. Petitioner's freight elevator operators are also "engaged in commerce" within the meaning of Sections 6 and 7	48
III. Petitioner's employees are not engaged in a "retail or service establishment" within the meaning of Section 13 (a) (2) of the Act	51
IV. The Act, as applied to the employees here involved, constitutes a valid exercise of the commerce power	57
Conclusion	63

CITATIONS

Cases:	
Abadie v. *Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164	32, 41
Abroe v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. 38, affirmed, 300 N. W. 456	43
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	22, 41
Associated Press v. *National Labor Relations Board*, 301 U. S. 103	47

455418—42——1

Cases—Continued. Page

Atkocus v. *Terker*, 30 N. Y. S. (2d) 628 ..... 31, 47
Baggett v. *Henry Fischer Packing Co.*, 37 F. Supp. 670 33
Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612 35
Baltimore & O. S. W. R. R. v. *Burich*, 263 U. S. 540 49
Beatty v. *Foutz Tool Co.*, 5 Wage Hour Rept. 259 ..... 31, 56
Berger v. *Clouser*, 36 F. Supp. 168 43
Binderup v. *Pathe Exchange*, 263 U. S. 291 49
Bowie v. *Gonsales*, 117 F. (2d) 11, 123 F. (2d) 387 ..... 42, 43, 59
Bowman v. *Pace Co.*, 119 F. (2d) 858 ..... 33, 41
Boyd v. *Dowell, Inc.*, decided February 28, 1941 31
Brotherhood of Railroad Shop Crafts v. *Lowden*, 86 F. (2d) 458 47
Brown v. *Bailey*, 4 Wage Hour Rept. 108 41
Brown v. *Carter Drilling Co.*, 38 F. Supp. 489 41
Campbell v. *Superior Decalcominia Co.*, 31 F. Supp. 663 42
Carlton v. *London Mines*, 4 Wage Hour Rept. 561 41
Cecil v. *Gradison*, 4 Wage Hour Rept. 698 ..... 32, 41
Collins v. *Kidd*, 38 F. Supp. 634 56
Collum v. *Stevens*, 5 Wage Hour Rept. 304 56
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 ..... 13, 15, 58, 60, 62
Crompton v. *Baker*, 220 N. C. 52, 16 S. E. (2d) 471 43
Daniel Ball, The, 10 Wall. 557 49
David v. *Boylan's Private Police*, 34 F. Supp. 555 ..... 33, 41
Dollar v. *Caddo River Lumber Co.*, 4 Wage Hour Rept. 521 42
Doyle v. *Johnson Bros.*, 176 Misc. 656, 28 N. Y. S. (2d) 452 ..... 42, 43
Drake v. *Hirsch*, 40 F. Supp. 290 47
Duncan v. *Montgomery Ward & Co.*, 42 F. Supp. 879 56
Eddings v. *Southern Dairies*, 5 Wage Hour Rept. 87 47
Erie R. R. Co. v. *Shuart*, 250 U. S. 465 49
Farr v. *Smith Detective Agency & Night Watch Service*, 38 F. Supp. 105 ..... 32, 41
Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349 30
Federal Trade Commission v. *Pacific States Paper Assn.*, 273 U. S. 52 49
Fleming v. *Alterman*, 38 F. Supp. 94 47
Fleming v. *American Stores Co.*, 42 F. Supp. 511 ..... 31, 47, 56
Fleming v. *Arsenal Building Corp.*, 125 F. (2d) 278, pending on writ of certiorari, No. 924, present Term 31, 42, 60, 62
Fleming v. *Atlantic Co.*, 40 F. Supp. 654 ..... 43, 47
Fleming v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 47
Fleming v. *Hamlet Ice Co.*, 4 Wage Hour Rept. 518, affirmed April 13, 1942 43

Cases—Continued.

	Page
Fleming v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52	55
Fleming v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255	56
Fleming v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300	42
Fleming v. *Swift & Co.*, 41 F. Supp. 825	42, 43
Fleming v. *Tidewater Optical Co.*, 35 F. Supp. 1015	56
Flores v. *Baetjer*, 4 Wage Hour Rept. 471	42
Gavril v. *Kraft Cheese Co.*, 4 Wage Hour Rept. 682	50
Gerdert v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964	32
Gonzalez v. *Central Monserrate*, decided August 23, 1941	43
Gordon v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980	33
Gregg Cartage & Storage Co. v. *United States*, No. 555, present Term, decided April 13, 1942	55, 56
Hamlet Ice Co. v. *Fleming*, decided April 13, 1942	42, 50
Hanson v. *Queensboro Farm Products, Inc.*, 5 Wage Hour Rept. 255	43
Hargrave v. *Mid-Continent Petroleum Corp.*, 42 F. Supp. 908, affirmed, 5 Wage Hour Rept. 275	42
Harrison v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, affirmed, 5 Wage Hour Rept. 241	50
Hart v. *Gregory*, 4 Wage Hour Rept. 605	41
Houston & Texas Ry. v. *United States*, 234 U. S. 342	30, 35
Ikola v. *Snoqualmie Falls Lumber Co.*, 4 Wage Hour Rept. 470, reversed 121 P. (2d) 369	44
Jacobs v. *Coppersmith & Sons*, decided Feb. 10, 1940	42
Jax Beer Co. v. *Redfern*, 124 F. (2d) 172	31
Jewel Tea Co. v. *Williams*, 118 F. (2d) 202	32
Johnson v. *Phillips-Buttorff Mfg. Co.*, 5 Wage Hour Rept. 112	43
Killingbeck v. *Garment Center Capitol, Inc.*, 259 N. Y. App. Div. 691, leave to appeal to Court of Appeals denied, 259 N. Y. App. Div. 1076	33, 45
LaRue v. *S. H. Robinson & Co.*, decided February 14, 1941 affirmed sub nom. *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. (2d) 359, 156 S. W. (2d) 432	42, 47
Lefevers v. *General Export Iron & Metal Co.*, 36 F. Supp. 838	42
Magann v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742	50
McMillan v. *Wilson & Co.*, 4 Wage Hour Rept. 409, affirmed, 5 Wage Hour Rept. 188	42
Merryfield v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794	32, 41, 45
Mid-Continent Pipe Line Co. v. *Hargrave*, 5 Wage Hour Rept. 275	42, 48, 49, 50
Milam v. *Texas Spring & Wheel Co.*, 157 S. W. (2d) 653	43
Mill v. *U. S. Credit Bureau*, 5 Wage Hour Rept. 114	56
Mingee v. *Dixie Greyhound Lines*, decided May 16, 1941	47
Minnesota Rate Cases, The, 230 U. S. 352	35

Cases—Continued. Page

Missell v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25, pending on writ of certiorari, No. 939, present Term.. 47
Monk v. *Continental Baking Co.*, 5 Wage Hour Rept. 205.. 44
Mortenson v. *Western Light & Telephone Co.*, 42 F. Supp. 319..... 44
Muldowney v. *Seaberg Elevator Co.*, 39 F. Supp. 275..... 43, 56
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601.. 30, 32, 35
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1..... 58
National Labor Relations Board v. *Mackay Co.*, 304 U. S. 333..... 47
National Labor Relations Board v. *Sunshine Mining Co.*, 110 F. (2d) 780, certiorari denied, 312 U. S. 678..... 62
Niehaus v. *Greenspon's Sons Pipeline Co.*, decided July 11, 1941..... 42, 43
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294..... 39
Overstreet v. *North Shore Corp.*, 4 Wage Hour Rept. 628..... 41
Owin v. *Liquid Carbonic Corp.*, 5 Wage Hour Rept. 69..... 44, 47
Pedersen v. *Delaware, Lackawanna & W. R. R.*, 229 U. S. 146..... 50
Pedersen v. *Fitzgerald Construction Co.*, 173 Misc. 188, 18 N. Y. S. (2d) 920, affirmed, 262 App. Div. 665, 30 N. Y. S. (2d) 989..... 32, 41
Philadelphia, B. & W. R. R. Co. v. *Smith*, 250 U. S. 101..... 46
Pruett v. *Carruthers & Son Lumber Co.*, 5 Wage Hour Rept. 192..... 43
Puget Sound Co. v. *Tax Commission*, 302 U. S. 90..... 49, 62
Reck v. *Zarnocay*, 4 Wage Hour Rept. 305..... 31, 43, 47
Reeves v. *Howard County Refining Co.*, 33 F. Supp. 90..... 42
Robinson v. *Massachusetts Mutual Life Ins. Co.*, 4 Wage Hour Rept., 725..... 32, 41
Rogers v. *Glazer*, 32 F. Supp. 990..... 41, 45
Santa Cruz Co. v. *National Labor Relations Board*, 303 U. S. 453..... 13, 15, 35, 38, 58, 62
Snyder v. *Casale, Inc.*, 5 Wage Hour Rept. 222..... 31
Southern Pac. Co. v. *Gallagher*, 306 U. S. 167..... 50
Southern Railway Co. v. *United States*, 222 U. S. 20..... 35
Spinner v. *Waterways Fuel & Dock Co.*, 5 Wage Hour Rept. 137..... 43
Steger v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411.. 47
Stiles v. *Emmons*, 5 Wage Hour Rept. 189..... 31
Stucker v. *Roselle*, 37 F. Supp. 864..... 56
Super-Cold Southwest Co. v. *McBride*, 124 F. (2d) 90..... 56
Swift & Co. v. *Wilkerson*, 124 F. (2d) 176..... 31
Sybert v. *Bradley*, 4 Wage Hour Rept., 630..... 41
Texas & N. O. R. R. Co. v. *Railway Clerks*, 281 U. S. 548.. 47, 62
Thompson v. *Daugherty*, 40 F. Supp. 279..... 50

Cases—Continued. Page

Travis v. *Ray*, 41 F. Supp. 6 50
Union Stock Yard Co. v. *United States*, 308 U. S. 213 49
United States v. *American Trucking Assns.*, 310 U. S. 534 ..... 39, 40
United States v. *Darby Lumber Co.*, 312 U. S. 100 ..... 29, 35, 57, 61
United States v. *Dickerson*, 310 U. S. 554 22
United States v. *Dickson*, 15 Pet. 141 55
Virginia Electric Power Co. v. *National Labor Relations Board*, 115 F. (2d) 414, Nos. 25, 26, this Term, decided December 22, 1941 62
Virginian Ry. v. *System Federation No. 40*, 300 U. S. 515 ..... 47, 58, 62
Warren-Bradshaw Drilling Co. v. *Hall*, 124 F. (2d) 42 ..... 31, 38
White Motor Co. v. *Littleton*, 124 F. (2d) 92 58
Wilkinson v. *Noland Co.*, 40 F. Supp. 1009 ..... 43, 47
Williams v. *General Mills*, 39 F. Supp. 849 43
Williams v. *Jacksonville Terminal Co.*, 35 F. Supp. 267, affirmed, 118 F. (2d) 324, affirmed No. 112, present Term, decided March 2, 1942 50
Womack v. *Consolidated Timber Co.*, 5 Wage Hour Rept. 10 ..... 44, 56
Wood v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 ..... 31, 42, 43, 56

Constitution and Statutes:

Constitution, Fifth Amendment 9
Constitution, Tenth Amendment 9, 57
Fair Labor Standards Act of 1938, 52 Stat. 1060 (29 U. S. C. § 201 *et seq.*):
Sec. 2 ..... 17, 19, 20, 58
Sec. 3 ..... 2, 9, 10, 13, 14, 15, 17, 22, 34, 36, 37, 38, 45
Sec. 5 ..... 19, 20, 21, 22
Sec. 6 ..... 2, 3, 4, 9, 10, 14, 15, 17, 18, 19, 20, 21, 23, 24, 32, 34, 39, 55
Sec. 7 ..... 2, 3, 4, 9, 10, 14, 15, 17, 18, 19, 20, 23, 24, 32, 34, 39, 54, 55
Sec. 8 ..... 19, 20, 22
Sec. 11 ..... 19, 22, 23
Sec. 13 ..... 2, 3, 9, 11, 12, 19, 37, 45, 51, 52, 53, 54, 55, 56

Miscellaneous:

81 Cong. Rec. 7957 25
82 Cong. Rec. 1580, 1835 25
83 Cong. Rec.:
pages 7436–7438 52
pages 7449–7450 25
pages 9164–9171 28
pages 9172, 9173 30
pages 9178, 9266–9267 25
86 Cong. Rec. 5268, 5457 40
H. Doc. No. 255, 75th Cong., 1st Sess., p. 3. "President's Message to the Congress, May 24, 1937" 25, 29
H. Rep. No. 1452, 75th Cong., 1st Sess 25

Miscellaneous—Continued.

	Page
H. Rep. No. 2182, 75th Cong., 3d Sess.	25, 30
H. Rep. No. 2738, 75th Cong., 3d Sess.	25, 27, 52
H. R. 5435 and 7133, 76th Cong., 3d Sess.	40
H. R. 7200, 75th Cong., 1st Sess., May 24, 1937, Sec. 2 (a) (24)	15
Interpretative Bulletin No. 1, November 1938	35, 39, 40
Interpretative Bulletins Nos. 5 and 6	40, 54, 55
Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200 (75th Cong., 1st Sess.), pp. 1–14, 19, 35–37	30, 52
S. 2475, 75th Cong., 1st Sess., May 24, 1937:	
Sec. 2	15
S. 2475, as passed by the House on May 24, 1938:	
Sec. 4	26
Sec. 5	26
Sec. 6	52
Sec. 11	51
S. 2475, as passed by the Senate on July 31, 1937:	
Sec. 1 (a)	26
Sec. 2 (a)	51
Sec. 4 (a)	26
Sec. 7	26
S. Rep. No. 884, 75th Cong., 1st Sess.	25

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 175–180) is reported in 38 F. Supp. 204. The opinion of the Circuit Court of Appeals (R. 213–222) is reported in 124 F. (2d) 567.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 17, 1941 (R. 223). The petition for writ of certiorari was filed January 29, 1942, and granted March 2, 1942. The jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Petitioner's employees covered by the injunction below are engaged in activities necessary to the operation and maintenance of a loft building in which large quantities of goods are produced for interstate commerce. The primary question presented is whether these employees are "engaged in * * * the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act because they are engaged in a "process or occupation necessary to the production" within the meaning of Section 3 (j) of the Act.

2. Two of the employees are freight elevator operators who transport goods arriving from other states or consigned to destinations in other states to and from the various lofts in the building. Are such employees also "engaged in commerce" within the meaning of Sections 6 and 7 of the Act?

3. Are the employees here involved "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of Section 13 (a) (2), which exempts such employees from Sections 6 and 7?

4. Does the Fair Labor Standards Act, as applied to the employees here involved, constitute a valid exercise of the commerce power?

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060 (29 U. S. C. § 201 *et seq.*). Copies of the Act will be furnished to the Court upon the oral argument.

STATEMENT

On April 19, 1940, the Administrator filed in the District Court an amended complaint against petitioner alleging that petitioner owned and operated a loft building devoted to the manufacture of goods for interstate commerce and that certain of petitioner's employees, by reason of the relationship of their work to the manufacturing activities conducted in the building, were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act.[1] Charging that such employees had not been paid the minimum wages prescribed by Section 6 or the overtime compensation required by Section 7, the amended complaint sought an injunction to re-

[1] The complaint did not allege violations with respect to the superintendent of the building because he falls within the exemption of executive employees provided by Section 13 (a) (1). Other employees such as rental and collection agents were not deemed to be engaged in commerce or production for commerce.

strain further violations (R. 3–7). In its answer petitioner admitted that it had not complied with Sections 6 and 7 but denied that any of its employees were subject to the Act or that the Act could constitutionally be applied to them (R. 8–14).

The facts, as found by the District Court, are not in dispute.[2] Petitioner owns and operates a six-story building in Philadelphia, Pennsylvania (R. 168; 8). The entire building was formerly occupied by petitioner as a factory devoted to the production of men's clothing. For some time prior to the filing of the complaint, however, it was operated as a "loft building" occupied by manufacturers producing large quantities of men's suits and coats, uniforms, pants, boys' wash suits, sweaters, bathing suits, and other types of garments (R. 168–169; 8–9, 82, 107, 135, 144, 155, 160). Seventy to eighty-five percent of the semi-finished and finished goods produced in the building are shipped out of the state (R. 169; 84, 109, 139, 147, 158).[3] The manufacturers also receive

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[2] The district court adopted Nos. 1 to 16 of the Administrator's proposed findings of fact (R. 180), and the Circuit Court of Appeals sustained the findings against petitioner's limited exception (R. 183, 213–214, 219–220). The findings are printed at pages 168–172 of the record. In the following statement the references preceding the semicolons are to the findings, and the succeeding references are to the supporting evidence or to admissions in the pleadings.

[3] The volume is large: the gross sales of three of the seven manufacturers total $2,000,000 per annum (R. 139, 151, 161). This figure reflects only the value of finished products

large quantities of raw materials and of semi-finished and finished goods from outside of Pennsylvania (R. 169; 84, 111, 139, 157). The delivery of incoming goods and materials and the shipment of outgoing products constitute a constant daily interstate flow (R. 169; 86, 119, 135, 138–139, 148, 159).

Petitioner employs one engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter, and a carpenter's helper (R. 169; 73). The engineer and firemen perform duties necessary to supply "exhaust" steam for heating the building; without such heat the manufacturers could not continue operation during the winter months (R. 169–170; 28–31, 33, 67, 113, 139, 150, 161; 89, 113, 140, 150, 161). They also produce "live" steam which is used directly in the manufacturing processes; some 140 pressing machines used in production for commerce by six of the manufacturers could not operate if the "live" steam supply were to fail (R. 170; 24, 25, 66–67, 74, 86, 107, 123–124, 137, 157). A steady supply of "live" steam is also essential to the sponging and shrinking operations carried on in two of the shops (R. 170; 26, 67, 75, 156); the

shipped and does not include the further shipment of semi-finished goods from the manufacturers to intermediate processors in other states or back to the manufacturers from the processors. These three manufacturers employ some 500 employees at an annual pay roll of more than $550,000 (R. 140–141, 150–151, 161).

manufacture of the garments could not be completed if the pressing and sponging machines were to cease functioning (R. 170; 75, 87, 107, 124, 137, 156).* The steam is also used to generate direct current electricity which not only lights the common portions of the building, such as halls and stairs, and the premises of two manufacturers, but also furnishes the motive power for 45 sewing machines which cannot operate on the alternating current available from the local utility company. (R. 170; 27–28, 34, 67, 77, 136, 140). Finally, the steam supplied by the engineer and firemen serves to keep the freight and passenger elevators running; if the pressure is permitted to fall below 50 pounds, the elevators will not work (R. 170; 28, 67, 76).

One elevator operator runs the passenger elevator, which carries employees, buyers, salesmen, visitors, and customers to and from the various manufacturing plants in the building (R. 171; 45,

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* Not only a continued supply of steam, but also a particular quality of steam is necessary to the manufacturing processes. The steam must be "live" steam and must be "dry" in order to be suitable for the processing operations; failure of the firemen to maintain the steam pressure at a minimum of 80 pounds would result in "wet" steam, useless to production (R. 69, 74). The availability of high-pressure steam of the proper quality was a factor which influenced most of the manufacturers to move their plants to petitioner's building (R. 124–125, 137, 145, 149–150).

101). The freight elevators, run by the other two operators, transport from the street level to the various lofts materials arriving from points in other states; they also transport from the lofts to the street level goods consigned to extra-state destinations (R. 171; 85, 135). While in the elevators, the goods are in the custody of the railroads, express companies, motor carriers or steamship lines which have been employed to transport the goods on their interstate journeys (R. 171; 37, 39, 57, 83–85, 108, 109, 120, 129, 135, 138, 148, 149, 158, 159). This interstate movement into and out of the building takes place daily in large volume (R. 171; 38, 149, 159). The amount, weight, and size of the shipments carried on the elevators are impressive. For example, J. B. Haber, Incorporated, receives yarn in 300-pound cases and ships finished garments in packages weighing 250 to 300 pounds (R. 107, 111). Men's clothing manufacturers receive 300 to 400 semi-finished suits at a time (R. 121) and send out several hundred in a single shipment (R. 122). Deliveries and shipments are made in cartons, bales, packing cases, wooden crates, and racks weighing as much as 1,000 pounds (R. 37, 55, 123, 159). Their size and weight make it impossible to carry them on the stairways (R. 58, 84). In the absence of elevator service, deliveries and shipments could not be made and the manufacturers would

be unable to continue production (R. 171; 88, 100, 123, 127, 149).[5]

The two watchmen employed by petitioner keep delivery and pick-up trucks moving in the street and guard the premises of the tenants from loss by fire or theft or from other sources; on their hourly rounds of the manufacturing plants they watch for prowlers, close windows, look for and control leaks in radiators, machinery, and sprinklers, and watch out for fires (R. 172; 42, 51–52, 64, 65). Each morning the watchmen turn on the heat in the boiler room and the steam valves on each floor so that steam will be available when manufacturing starts (R. 172; 53).[6] The porter, carpenter, and carpenter's helper clean, repair, and maintain the halls, stairways, and other common portions of the building which are utilized by the manufacturers, thus preventing the building from becoming filthy or rundown (R. 172; 44, 78–79).

Most of petitioner's employees perform substantially the same duties as they did while petitioner itself was conducting manufacturing operations in the building (R. 172; 40, 66, 192–194).

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[5] It is also the duty of the elevator operators to remove trash, refuse, and waste materials placed outside their premises by the manufacturers; otherwise the elevator entrances would be blocked and the movement of goods into and out of the manufacturing plants impeded (R. 171; 58–62).

[6] If petitioner did not supply watchman service, the manufacturers would have to engage watchmen of their own (R. 103, 161).

Upon the basis of the foregoing evidence, the District Court concluded that all of the employees covered by the complaint are engaged in the "production of goods for commerce" within the meaning of Sections 6, 7, and 3 (j) of the Act; that the freight elevator operators are also "engaged in commerce" within the meaning of Sections 6 and 7; that petitioner had violated those sections; that petitioner's employees were not engaged in a "service establishment" within the meaning of Section 13 (a) (2); and that the Act as applied to petitioner's employees offends neither the Fifth nor the Tenth Amendments (R. 174–175, 180). On April 28, 1941, the court entered judgment directing the issuance of an injunction as prayed for in the complaint (R. 181–182).

The Circuit Court of Appeals held that the application of Sections 6 and 7, by their terms, turned upon the nature of the employee's activities and not upon the general character of the employer's business (R. 214–217); that as so construed the Act constituted a valid exercise of the commerce power (R. 217–218); that all of the employees covered by the complaint were engaged in production for commerce as defined in the Act since they were engaged in occupations necessary to such production (R. 218–220); that the elevator operators were also directly engaged "in commerce" (R. 219); and that petitioner's enterprise was not a "service establishment" within the

meaning of Section 13 (a) (2) (R. 220–221). The judgment of the district court was accordingly affirmed (R. 223).

SUMMARY OF ARGUMENT

I

The minimum-wage and maximum-hour requirements of Sections 6 and 7 of the Act extend to any employee "who is engaged in commerce or in the production of goods for commerce." Section 3 (j) provides that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production, in any State." Under these provisions, the nature of the particular employee's activities plainly determines the coverage of the Act. And since the activities of the employees here involved are clearly necessary to the extensive production for commerce carried on in petitioner's building, coverage is established.

A. Petitioner's contention that the employer, as well as the employee, must be engaged in commerce or in production for commerce is untenable in view of the unambiguous language of Sections 6, 7, and 3 (j). The other sections upon which petitioner relies are not the ones operative here and, in any event, they do not support the inference which petitioner seeks to draw from them. Further, the legislative history reveals that Congress had before

it both the "employer test" and the "employee test" and deliberately chose the latter as the vehicle for achievement of its stated objectives.

B. In any event where, as here, the employees themselves are engaged in production for commerce within the meaning of the Act, the "employer test" suggested by petitioner imposes no additional limitation not already imposed by the "employee test" required by the statute. In its capacity as the employer of particular employees, petitioner is engaged in production for commerce to precisely the same extent as its employees are so engaged.

C. There is nothing to support petitioner's suggested limitation that no employee can be engaged in a "process or occupation necessary to the production" unless he has physical contact with the goods or the materials going into them. The limitation is not warranted by the statute as written, renders the exemptive provision of Section 13 (a) (1) superfluous, and is discredited by the subsequent legislative history of the Act.

II

Petitioner's elevator operators are also "engaged in commerce" within the meaning of Sections 6 and 7. The interstate flow of goods from and into petitioner's building begins and ends at the manufacturer's premises, where the carriers receive and deliver them. The transportation by elevator is a part of the interstate journey and the employees

who operate the elevators are necessarily "in commerce."

III

Petitioner's employees are not exempt as employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (Section 13 (a) (2)). The legislative history demonstrates that this exemption was intended to apply to employees engaged in establishments which cater to the needs of the ultimate consumer; this is shown, too, by the conjunction in the statute of "retail or service" establishments.

Petitioner's business has none of the characteristics connoted by the term "service establishment." If the building is an "establishment" at all, it is a "manufacturing establishment." The typical "service establishment" renders services as its sole or principal function and resembles closely, in respects relevant to the reasons for the exemption, the retail store with which it is grouped in Section 13 (a) (2).

Petitioner's interpretation of the "service establishment" exemption to cover all enterprises providing facilities rather than manufacturing or selling merchandise, renders meaningless specific exemptions which the Act provides for a number of such enterprises. The burden is on petitioner to prove its right to the exemption; it has failed to show that it is within either the language or the policy of Section 13 (a) (2).

IV

As applied to the employees here involved, the Act constitutes a valid exercise of the commerce power. When the activities of employees are "necessary to the production" (Section 3 (j)) they likewise bear the requisite "close" or "direct" relation to commerce. Such activities may be "in relation to productive industry" (*Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 463–464) and need not be a part of the manufacture itself. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

The Fair Labor Standards Act, insofar as it seeks to protect commerce against the injurious effects of industrial strife, finds direct precedent in the validity of the National Labor Relations Act when applied to employees such as those here involved. And the Act is equally valid in so far as it seeks to protect commerce from substandard competition; since the activities of petitioner's employees are necessary to the production of goods, those goods would move in commerce as the result of substandard wages and hours if the Act were not applicable. If the employees were employed by the manufacturers they would be clearly within the scope of federal regulation; petitioner's particular arrangement for discharge of the same necessary duties by persons in its employ does not afford insulation against the commerce power.

ARGUMENT

I

PETITIONER'S EMPLOYEES ARE ENGAGED "IN THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE ACT

Section 6 of the Act provides that "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *." Section 7 provides that "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *" for more than a specified number of hours per week, unless "time and a half" is paid for the extra hours. Section 3 (j) reads as follows:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Under these statutory provisions, it is plain that the applicability of the wage and hour provisions of the Act to any particular employee

depends solely upon whether or not that employee is "engaged in commerce or in the production of goods for commerce." And whether an employee is engaged in "production of goods for commerce" depends in turn upon whether he is engaged in any of the activities enumerated in Section 3 (j), including "any process or occupation necessary to the production * * * *." The statute does not attempt to enumerate what processes or occupations are "necessary to the production"; that question is rather left to be determined upon the facts of individual cases as they arise. Cf. *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466–468; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222.[7]

In the present case, the requisite necessary relation of the employees' activities to the production of goods for commerce carried on in petitioner's

[7] That Congress intended to introduce an element of flexibility, permitting application of Sections 6 and 7 to turn upon the degree to which an employee's activities are "necessary", is shown by the legislative history of Section 3 (j). In earlier drafts of the bill introduced in the Senate, the clause "or in any process or occupation necessary to the production thereof, in any State" did not appear; instead there appeared a very specific clause: "or in the making of tools and dies used in the production of such goods in any State." S. 2475, 75th Cong., 1st Sess., May 24, 1937, Sec. 2 (*a*) (24). The corresponding provision of the bill introduced in the House was identical except that it did not contain the phrase "in any State." H. R. 7200, 75th Cong., 1st Sess., May 24, 1937, Sec. 2 (a) (24).

building is, we believe, clearly established. The evidence reviewed in the Statement (*supra*, pp. 4–8) shows that if the employees ceased to discharge their duties, or discharged them inefficiently, heat, steam and electricity directly necessary to continuance of the productive processes would fail, freight and passenger elevator service indispensable to the functioning of the manufacturing plants would not be available, essential precautionary measures against loss from fire, theft, and other sources would not be taken, and the building would become filthy and fall into disrepair, with readily apparent effects upon the manufacturing activities.

This is not merely a remote or speculative relationship. For upon the record in this case it is perfectly plain that a stoppage of work by the employees here involved would mean that the production, sale and shipment of goods by the manufacturers in the building could not continue. The effect of such a stoppage upon commerce would thus be quite as direct and quite as complete as though the manufacturers' own employees, engaged directly in manufacturing processes, were to cease work. The Government introduced evidence into the record concerning the strike of maintenance employees in New York City during February 1939, which graphically demonstrates the effect upon production of a cessation of work on the part of such employees. The strike resulted from a dis-

pute over wages and hours (R. 196, 208). Cf. Section 2 of the Act. Although it lasted but three days, production in the buildings affected came to a virtual halt (R. 196, 197) and interstate transportation into and out of the buildings was adversely affected (R. 201–207). Stoppage of elevator service prevented manufacturers and their employees from reaching the plants and the lack of "live" steam stopped processing operations (R. 197, 200). Incoming goods remained undelivered; outgoing goods could not be shipped (R. 197, 201). The virtual cessation of production also had a direct effect upon production by contractors in other states (R. 198–199).

It is thus clear, we believe, that the activities of employees such as those here involved are "necessary to the production" of goods for commerce within any normal usage of those words; indeed, petitioner scarcely denies this fact. Rather, petitioner seeks to change in two respects the test of applicability which Sections 6, 7 and 3 (j) in terms require. First, it contends that the employer, as well as the employee, must be "engaged in commerce or in the production of goods for commerce" in order for Sections 6 and 7 to apply (Brief, 11). Second, it apparently contends that no employee can be engaged in a "process or occupation necessary to the production" within the meaning of Section 3 (j) unless he has physical contact with the goods or with the materials going into them (Brief, 52, 54). Neither

contention, we submit, finds any support in the language of the statute or in its legislative history. Further, acceptance of the first contention would not advance petitioner's case, since, as we show below (pp. 34–36), an employer is engaged in commerce or in the production of goods for commerce to the same extent as his employees are so engaged.

A. THE APPLICABILITY OF SECTIONS 6 AND 7 DEPENDS SOLELY UPON THE NATURE OF THE EMPLOYEE'S ACTIVITIES

Petitioner's contention that the applicability of Sections 6 and 7 does not turn upon the nature of the employee's activities is far from clear. While petitioner at times seems to propose a dual test of coverage, under which the employer and the employee must each be engaged in commerce or production for commerce (Brief, 11, 44, 49), it also strongly suggests that the employer must, in addition, be a member of what petitioner says "may be termed an interstate industry" (Brief, 17, 26). Whatever the scope of the contention may be, however, it must be rejected as in direct contravention of the terms of the Act and of its legislative history, which make clear that Congress intended the relation of the employee's activities, and not of the employer's business, to interstate commerce to be decisive.

1. *The statutory language.*—Section 6 unambiguously requires the payment of not less than prescribed minimum wages by "every employer" to "each of his employees who is engaged in com-

merce or in the production of goods for commerce." Under Section 7, "no employer" may work "any of his employees," so engaged, in excess of the statutory workweek without paying the required overtime compensation. The terms "every," "each," "no," and "any" preclude the qualifications which petitioner would insert. And Section 3 (j) unequivocally defines "produced" in terms of what the employee does; it provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed" in the enumerated activities.*

Petitioner draws its proposed additional requirement that the employer satisfy the criteria stated with reference to the employee, namely that he be engaged in commerce or production for commerce, from Sections 2, 5, 8, and 11 of the Act. It would take an exceedingly clear inference from these sections to justify engrafting an addition upon the unambiguous language of Sections 6 and 7. And the fact is that the sections upon which petitioner relies in no way justify the inference drawn, as both courts below held (R. 178, 217).

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*The exemptive provisions of the Act emphasize that Congress was careful to distinguish between instances in which the nature of the employee's work, and those in which the character of the employer's business, was determinative. Section 13 (a) enumerates eleven exemptions from the wage and hour requirements. Subdivisions 1, 3, 5, and 6 turn upon the activities of the employee; subdivisions 2, 4, and 9 depend upon the nature of the employer's enterprise.

In Section 2, the preamble of the Act, Congress spoke in terms of "industries engaged in commerce or in the production of goods for commerce." It is apparent, and Congress doubtlessly contemplated, that the mass of the employees covered by the "employee test" stated in Sections 6 and 7 would be engaged in industries manufacturing goods for shipment in interstate commerce. But this fact certainly does not warrant an assumption that Sections 6 and 7 were intended to be limited to such industries, contrary to the express language which Congress deliberately chose to use in those sections. In any case, the inference which petitioner seeks to draw from the preamble is effectively negatived by the title of the Act: "An act to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes."

The language of Sections 5 and 8 providing for the formation of industry committees for "each industry engaged in commerce or in the production of goods for commerce," and for the recommendation by such committees of minimum wages to be paid "by employers engaged in commerce or in the production of goods for commerce in such industry" affords no firmer ground for petitioner's contention. On the contrary, these sections show that if Congress had intended Sections 6 and 7 to be similarly limited, the language was ready at hand. The particular means chosen by Congress for acceleration of the 40 cent minimum

wage provided in Section 6 cannot operate to alter the substantive content of Section 6 itself. The nature of the problem presented by the desire of Congress to accelerate the 40 cent minimum wage without unduly disrupting the economy of the nation makes it readily understandable why acceleration was provided on an industry basis. Indeed, it would seem that the only administratively practicable choice which Congress had was to proceed either on a sectional or an industry basis. The fact that, for purposes unrelated to the coverage of the Act as set forth in Section 6, Congress chose to proceed on an industry basis cannot be taken as evidence of an intention to limit the clear language of Section 6.

The correctness of our view, that such an intention may not be inferred is indicated by the fact that in the case of Puerto Rico and the Virgin Islands, where the geographical area covered was sufficiently small and the conditions sufficiently homogeneous to permit wage adjustment by area rather than by industry, the Administrator was given power to appoint a "special industry committee" to set a minimum wage applicable "to all employees * * * engaged in commerce or in the production of goods for commerce * * *" (Section 5 (e), added by amendment of June 26, 1940, 54 Stat. 615 (29 U. S. C. Sec. 205 (e)). In other words, where the nature of the subject matter dealt with did not make desirable a departure from the "employee test" used in Sec-

tions 6 and 7, Congress also maintained that test for the wage adjustment procedure.[9]

Petitioner's final reliance is upon Section 11 (a) and 11 (c). Section 11 (a) authorizes the Administrator to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act * * *." This authorization was plainly in aid of the acceleration mechanism provided by Sections 5 and 8, and the procedures appropriate to investigation for purposes of gathering information indicated the advisability of an industry approach.[10] But to obviate all doubt, Section 11 (a) also authorized the Administrator to—

> enter and inspect such places and such records (and make such transcriptions

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[9] Petitioner advances (Brief, note 7, p. 23) two arguments against ascribing any weight to Section 5 (e): first, that with regard to territories Congress is not subject to the same limitations upon the commerce power as exist with regard to the several states; and, second, that an amendment two years after passage of the Act cannot shed light upon the original legislative intent. The first contention ignores the fact that, however plenary the power of Congress over territories, it expressly placed territories in the same position as states for purposes of the Fair Labor Standards Act. Section 3 (c). The second contention contravenes settled principles of statutory construction. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487–489; *United States* v. *Dickerson*, 310 U. S. 554, 562. Petitioner does not attempt to rebut the cogent presumption that Congress intended Section 5 (e) to fit logically and without conflict into the text of the Act as it stood prior to amendment.

[10] The manifest intent was to enable the Administrator to obtain a complete picture of conditions in an "interstate

> thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *

It is only by disregarding this portion of Section 11 (a) that petitioner (Brief, 25–27) has made the section appear to proceed entirely on an industry basis; actually, it is broad enough to permit investigation whenever there is reason to believe that any employee engaged in commerce or production for commerce has not received the benefits of Sections 6 or 7.

Section 11 (c) (Brief, 27–28) merely provides that "every employer subject to any provision of this Act" shall keep and preserve pay-roll records in such form as the Administrator may prescribe by regulation. This language manifestly proves nothing with respect to the point at issue. If Sections 6 and 7 mean what they say and apply to "each" and "any" employee who is engaged in commerce or production for commerce, then the employer of each such employee must comply with Section

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industry" in order to promulgate a wage order fair to all in that industry. Accordingly, the authorization was sufficiently broad to permit investigation of the labor standards observed by employers in an industry who were not producing for commerce so as to permit an informed appraisal of what accelerated minimum wage employers in the industry who were producing for commerce could pay without being placed in an unfair competitive position.

11 (c) with respect to the work records of such employee. The language plainly cannot be distorted to read that only "employers engaged in commerce or production for commerce" are required to keep appropriate records."

In sum, petitioner would read Section 6 to state that "every employer *engaged in commerce or in the production of goods for commerce* shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates. * * *."[12] A corresponding limitation is read into the provisions of Section 7. There is nothing in the plan or language of the statute as a whole which in any way justifies this distortion of the unambiguous words which Congress actually used.

2. *The legislative history.*—The history of the minimum wage and maximum hour provisions of

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[11] The same observation is applicable to petitioner's paraphrasing of Sections 6 and 7 in the portion of its brief (pp. 3, 4) entitled "Statute Involved." Petitioner's gratuitous insertion of the phrase "every employer covered by the Act" into the terminology of those sections cannot change the meaning: if one, some, or all of his employees are engaged in the activities stated in the sections, the employer is "covered by the Act" insofar as those employees are concerned. See *infra*, pp. 34–36.

[12] Under petitioner's triple test, which is advanced alternately with the double test stated in the text (*supra*, p. 18), Section 6 would read "Every employer *engaged in commerce or in the production of goods for commerce in an industry so engaged* shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *" (see Brief, pp. 16–17, 26).

the Act as they moved through a somewhat complicated legislative process[13] demonstrates that Congress specifically considered whether the "employee test" or the "employer test" should govern the coverage of those provisions and deliberately resolved the issue in favor of the former. The bill as passed by the House provided for the establishment of wage and hour standards with respect to all employees of "every employer

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[13] The legislation was initiated by a message from the President dated May 24, 1937 (H. Doc. No. 255, 75th Cong., 1st Sess.). On the same day companion bills were introduced in both houses (S. 2475 and H. R. 7200). In June 1937 joint hearings were held by the Senate Committee on Education and Labor and the House Committee on Labor. On July 8, 1937, the Senate Committee reported S. 2475 (S. Rep. No. 884, 75th Cong., 1st Sess.) and this bill, with some floor amendments, passed the Senate on July 31, 1937 (81 Cong. Rec. 7957). The House Committee on Labor considered the Senate bill, S. 2475, rather than the House companion bill and reported it on August 6, 1937 (H. Rep. No. 1452, 75th Cong., 1st Sess.). On December 15, 1937, the House Committee substituted another draft (82 Cong. Rec. 1580) in place of the bill previously reported. On December 17, 1937, this substitute bill was recommitted by the House to the House Committee on Labor (S. 2475, December 17, 1937, 75th Cong., 2d Sess.; 82 Cong Rec. 1835). On April 21, 1938, the House Committee on Labor reported still a third draft of S. 2475 (H. Rep. No. 2182, 75th Cong., 3d Sess.). This bill, with some floor amendments, passed the House on May 24, 1938 (83 Cong. Rec. 7449–7450). The Senate and House versions of the bill were then sent to a Joint Conference Committee, which arrived at an agreement on June 11, 1938 (H. Rep. No. 2738, 75th Cong., 3d Sess.). The bill agreed to by the conferees was adopted in both Houses on June 14, 1938 (83 Cong. Rec. 9178, 9266–9267), and the Act was approved by the President on June 25, 1938.

engaged in commerce in any industry affecting commerce"; coverage thus depended exclusively upon the character of the employer's business.[14] But the bill as previously passed by the Senate rested coverage solely upon the nature of the individual employee's activities.[15] This di[illegible] con-

[14] S. 2475, as passed by the House on May 24, 1938. The minimum wage provision (Section 4) stated that "Every employer engaged in commerce in any industry affecting commerce shall * * * pay each employee employed by him * * *"; the maximum hour provision (Section 5 (a)) stated that "No employer engaged in commerce in any industry affecting commerce shall employ any of his employees * * * *."

[15] S. 2475, as passed by the Senate on July 31, 1937. Section 7 made it unlawful for "any person, directly or indirectly * * * to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale" in such commerce. In an effort to establish that the bill passed by the Senate did not adopt the "employee test," petitioner invokes the references, in the whereas clauses of Section 4 (a), to wage and hour conditions obtaining in "interstate industries" (Brief, 31). As in the case of the Act as it now stands, such recitations cannot serve to deny effect to the clear terms of the operative provisions (*supra*, p. 20). Further, petitioner insists (Brief, 18) that since Section 1 (a) of the bill as passed by the Senate recited substandard labor conditions in "occupations" in commerce or production for commerce, the subsequent omission of that term from the Act evidences a shift from the "employee test" to the "employer test." Petitioner thus argues in both directions with respect to the Senate bill. Efforts to follow petitioner's reasoning are further impeded by the fact that the bill passed by the House, which petitioner concedes turned exclusively upon the "employer test" (Brief, 26), likewise used "occupations" in its preamble. S. 2475, as passed by the House on May 24, 1938, Sec. 2 (a). The confusion into which petitioner's various arguments resolve when placed

flict, along with others, was resolved in conference. The unanimous conference report recommending passage of the revised bill shows that the conferees were fully aware of the conflict, which they resolved in favor of the Senate version. The conference report states:

> Section 6 of the conference agreement provides for the establishment of minimum wages for employees engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the employer was engaged in commerce in any industry affecting commerce. * * *
>
> Section 7 of the conference agreement provides for the establishment of maximum hours of employment for employees engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the employer was engaged in commerce in an industry affecting commerce.[16]

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side by side pointedly illustrates the danger of ascribing a meticulous and discriminating delimitation of coverage to general terms used in preambles while concurrently implying a loose use of precise language in the operative provisions.

[16] H. Rep. 2738, 75th Cong., 3d Sess., pp. 29, 30. The statement of Senator Pepper (Pet. Brief, 35) during debate on the conference agreement contains nothing inconsistent with the conclusion, clear from the face of the agreement and the bill which accompanied it, that the conferees deliberately rejected the "employer test" in favor of the "employee test." Petitioner's quotations (Brief, 33–34) from statements con-

Petitioner asserts that the conference agreement narrowed the coverage under the "employer test" of the House bill and, consequently, that anything beyond the scope of that bill is also beyond the scope of the Act. The basis of the contention is that the conference agreement "rejected the theory of coverage based upon activity 'affecting commerce'" (Brief, 56). The fact of the matter, however, is that since the House bill applied to "every employer engaged in commerce in any industry affecting commerce" (note 14, p. 26, *supra*), no appropriate place remained for the phrase "affecting commerce" when the conferees dropped the industry test and adopted the employee's activities as the test of coverage. "Affecting commerce" had never appeared in any draft as a term describing or modifying the employee's activities; its deletion, therefore, cannot imply a restriction of coverage based on the relation of those activities to commerce.

The phrase "affecting commerce" is not, as petitioner seems to suggest, the only means whereby a Congressional intention to exercise the commerce power to its constitutional limits may be expressed. Some subjects of regulation appropriately call for the use of "affecting commerce" to express such an

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cerning the conference agreement by Senators Thomas, Borah, and Bailey establish only that the debate revolved about the extent of Congressional power, not the comparative merits of the "employer test" and the "employee test." See 83 Cong. Rec. 9164–9171.

intention."[17] But where, as here, Congress was dealing with the production of goods for interstate commerce, "affecting commerce" had no proper place. The phrase could not be used to modify either "production" or the activities of employees in connection with production. Congress was concerned with assuring that the production of goods passing in commerce met certain modest labor standards (*United States* v. *Darby Lumber Co.*, 312 U. S. 100, 113–115); in the words of the President, the purpose of the Fair Labor Standards Act was to insure that "only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce." *President's Message to the Congress, May 24, 1937,* H. Doc. No. 255, 75th Cong., 1st Sess., p. 3. To obtain the widest possible achievement of that purpose, Congress defined "commerce" and "produced" in the most sweeping terms (Sections 3 (b), (j)). The breadth of those definitions, the purpose of the Act, and its legislative history, all preclude any contention that with respect to activities in connection with production for commerce, the focal point of the statute, there

[17] Thus under the National Labor Relations Act Congress attempted to protect commerce from the burdening and obstructive effects of labor disputes caused by unfair labor practices; the particular segment of industry in which these recognized sources of strife occurred was not deemed significant so long as the strife would "affect commerce" by stopping or materially decreasing the interstate movement of goods.

is not evidenced an "intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607.[18] The Congressional debates were cast in terms of the extent of constitutional power to regulate wages and hours in view of apparently conflicting decisions of this Court; the premise that the proposed legislation reached the limits of that power was assumed. See, e. g., 83 Cong. Rec. 9166 *et seq.*; *Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200* (75th Cong., 1st sess.) pp. 1–14, 19.[19]

3. *The decisions.*—In addition to the court below, the Second and Fifth Circuits, the only Circuit Courts of Appeals to pass on the question, have

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[18] The sole possible exception to this statement concerns regulation of production for exclusively intrastate sale and consumption of goods which compete with goods brought into the State in interstate commerce. Cf. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349; *Houston & Texas Ry.* v. *United States* (*Shreveport Case*), 234 U. S. 342. This is not a true exception since such production is not "for commerce" within the meaning of the Act. A provision specifically extending the bill to such activity (S. 2475, 75th Cong., 2d Sess., as recommitted Dec. 17, 1937, Sec. 8 (a)) was dropped from an intermediate draft by the House Committee (S. 2475, 75th Cong., 3d Sess., as reported April 21, 1938; H. Rep. 2182).

[19] Senator Borah was of the opinion that a newspaper which shipped only 20 or 30 copies outside of the state was subject to the proposed statute (83 Cong. Rec. 9172). And Senator Wagner stated that the scope of the bill was as broad as that of the National Labor Relations Act (83 Cong. Rec. 9173).

adhered to the "employee test." *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term; *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5); cf. *Jax Beer Co.* v. *Redfern*, 124 F. (2d) 172, 174 (C. C. A. 5); *Swift & Co.* v. *Wilkerson*, 124 F. (2d) 176, 177 (C. C. A. 5). Eight decisions of other courts are in accord,[20] although, notwithstanding the clear wording of Sections 6 and 7, a conflict exists in the district and state courts.

Cases cited by petitioner (Brief, 44–48, 65) contrary to the Government's position were all decided prior to both the decision below and that of the Second Circuit in the *Arsenal Building* case. Two

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[20] *Snyder* v. *Casale, Inc.*, 5 Wage Hour Rept. 222 (S. D. N. Y.) (employees repairing and maintaining trucks leased by employer to companies producing goods for commerce); *Beatty* v. *Foutz Tool Co.*, 5 Wage Hour Rept. 259 (S. D. Cal.) (employees of machine shop engaged in repairing oil drilling equipment used in production for commerce); *Boyd* v. *Dowell, Inc.*, decided February 28, 1941 (D. C. Lea Co., N. Mex.) (employees chemically treating low-production oil wells owned and drilled by persons other than the employer); *Stiles* v. *Emmons*, 5 Wage Hour Rept. 189 (Ct. Comm. Pl. Ohio) (employees of contract motor carrier transporting within state scrap paper from storage plants to factories of independent paper manufacturers producing for commerce); *Atkocus* v. *Terker*, 30 N. Y. S. (2d) 628 (Mun. Ct.) (watchman of independent contractor repairing bridge over navigable waters of United States). See also *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 46 (W. D. Tenn.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511, 522 (E. D. Pa.); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y.), pending on appeal to Appellate Division, 1st Department.

gave almost decisive weight to the omission of the words "affecting commerce" from Sections 6 and 7 (*supra*, pp. 28–30).[21] Four others involved no question of "production for commerce" but contain language to the effect that the "employer test" is appropriate under Sections 6 and 7.[22] Two cases involved only the question whether employees of a wholesaler who were engaged in the intrastate distribution of goods received by their employer from outside the state were "in commerce."[23] Two were dismissed because the employee brought suit

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[21] *Merryfield* v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794 (D. N. H.), pending on appeal to the First Circuit; *Robinson* v. *Massachusetts Mutual Life Ins. Co.*, 4 Wage Hour Rept. 725 (Sup. Ct. Tenn.).

[22] In *Cecil* v. *Gradison*, 4 Wage Hour Rept. 698 (Ct. App. Ohio) and *Farr* v. *Smith Detective Agency & Night Watch Service*, 38 F. Supp. 105 (N. D. Tex), the office buildings watched or maintained by the plaintiff employees were not devoted to production. The same is true of the *Robinson* case, *supra*, note 21. In *Pedersen* v. *Fitzgerald Construction Co.*, 173 Misc. 188, 18 N. Y. S. (2d) 920 (Sup. Ct.), affirmed without opinion, 262 App. Div. 665, 30 N. Y. S. (2d) 989 (3d Dept.), now pending on appeal to the Court of Appeals the employee was engaged in repairing a bridge; no "production" was involved. In *Abadie* v. *Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164 (E. D. La.) four-fifths of one percent of the goods manufactured in the plant were shipped in commerce; by application of the *de minimis* rule (cf. *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607), the court determined that there was no production for commerce in which the plaintiff employee could have been engaged.

[23] *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202 (C. C. A. 10); *Gerdert* v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964 (S. D. Fla.).

against someone other than his employer.[24] One of the cases adopts the "employee test" if it can be said to subscribe to either.[25] The remaining decision, denying recovery on facts very similar to those present here, seems to have been influenced by the court's view that "a portion" of the loft building had "perhaps fortuitously, been rented to tenants engaged in interstate commerce." *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 N. Y. App. Div. 691, 693 (1st Dept.), leave to appeal to the New York Court of Appeals denied, 259 N. Y. App. Div. 1076.[26]

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[24] In *Bowman* v. *Pace Co.*, 119 F. (2d) 858 (C. C. A. 5), an employee of a watchman's agency company named as the sole defendant the manufacturer whose plant he guarded. The court held that the plaintiff could sue only his employer, stating that "if the employment as watchman comes under the Act, Forsyth [Detective Service] owes him the minimum wage, for he is Bowman's employer" (p. 860). In *David* v. *Boylan's Private Police*, 34 F. Supp. 555 (E. D. La.), the watchman joined both the detective agency and the manufacturer as defendants; a motion to dismiss was granted as to the manufacturer and trial of the case against the agency was ordered.

[25] *Baggett* v. *Henry Fischer Packing Co.*, 37 F. Supp. 670 (W. D. Ky.). The court held that a complaint which failed to allege that the employee was engaged in commerce or in production therefor was defective even though it alleged that the employer was so engaged. See *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 986 (W. D. Ky.).

[26] In the present case production for commerce was carried on in the building when petitioner occupied it as a single factory, and the building has been occupied almost entirely by garment manufacturers producing for a national market ever since petitioner abandoned manufacturing operations and divided the building into lofts.

B. EVEN UNDER THE "EMPLOYER TEST" THE EMPLOYEES HERE INVOLVED WOULD BE ENTITLED TO THE BENEFITS OF SECTIONS 6 AND 7

Even if the wording of Sections 6 and 7 and the legislative history of those sections did not conclusively rebut petitioner's view that they turn upon the employer's activities in addition to those of his employees, the latter would nevertheless be entitled to the benefits of the Act. For where employees are "'engaged in commerce or in the production of goods for commerce", it necessarily follows that the employer is likewise so engaged; accordingly, the "employer test" does not in fact impose any additional limitation not already imposed by the "employee test."

Any contention that an employer is not engaged in commerce or production therefor, although some of his employees are so engaged, must proceed upon a contradiction in terms. When petitioner's firemen, in the course of their employment, supply steam necessary to the manufacturing operations carried on in the building, petitioner is supplying such steam as a part of its business; if the firemen, by virtue of their connection with the production, are "engaged in production" as defined in Section 3 (j), petitioner is necessarily so engaged.

Nor may this simple proposition be obscured by terming petitioner "a mere landlord" or by implying that it cannot be engaged in production for commerce because its primary business con-

sists, not of supplying steam or otherwise facilitating productive processes, but of renting space to tenants. In this regard petitioner is in no different position from a manufacturer who produces principally for intrastate sale and consumption and only to a comparatively minor extent for interstate commerce; so long as the goods shipped out of the state constitute "more than that to which courts would apply the maxim *de minimis*" (*National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607), such a manufacturer is engaged in production for commerce and is subject to the Act with reference to all of his employees whose activities are necessary to such production."

In other words, the so-called employer test cannot be applied to an employer in the abstract. The activities of the particular employee to whom the Act is alleged to apply necessarily frame the issue; it is in its capacity as the employer of such

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" The business of such a manufacturer might be arranged in one of two ways. The production for commerce might be confined to a few of the workers, with the bulk of the employees engaged exclusively in intrastate production; under the "employee test" the Act would apply only to the few. Interpretative Bulletin No. 1, pars. 3, 5 (November 1938). But if all the employees worked indiscriminately on all of the goods produced, all would be covered. Cf. *United States* v. *Darby Lumber Co.*, 312 U. S. 100; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453; *Houston & Texas Ry.* v. *United States* (*Shreveport case*), 234 U. S. 342; *The Minnesota Rate Cases*, 230 U. S. 352, 399; *Southern Railway Co.* v. *United States*, 222 U. S. 20.

an employee that petitioner must resist application of the statute. As the employer of renting agents, collectors, and others whose processes or occupations are not necessary to production, petitioner is engaged in no production of any kind, interstate or intrastate. But in its capacity as the employer of the employees involved in this case, petitioner is engaged in production for commerce to precisely the same extent that they are so engaged.

C. THE ACTIVITIES OF MAINTENANCE EMPLOYEES SUCH AS THOSE HERE INVOLVED CONSTITUTE PROCESSES OR OCCUPATIONS NECESSARY TO PRODUCTION WITHIN THE MEANING OF SECTION 3 (j)

Petitioner argues that the phrase "any process or occupation necessary to the production" (Section 3 (j)) should be interpreted to include only activities "devoted to the physical production of tangible goods," "processes integrally related to the physical production of goods," and services which "directly function in the production of goods" (Br. 52, 55). These alleged criteria are not defined other than by the statement that they may perhaps include some employees "who do not come in physical contact with the goods" (Br. 54). If the suggested tests are intended as anything more than a paraphrase of the general language of the statute itself, however, they must be taken as meaning that the statute should be construed to include only activities involving either physical contact with the goods during their production or with the materials going into the goods. But activities in-

volving such physical contact are covered by the preceding clauses of Section 3 (j): "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods * * *." It is apparent that this part of the statutory definition was intended to encompass all employees who perform operations on or otherwise handle goods; the additional clause "or in any process or occupation necessary to the production" includes other activities related to the production.

The arbitrary limitation which petitioner apparently seeks to impose upon the word "necessary" would also render Section 13 (a) (1) of the Act supererogatory and thereby ascribe redundance where none otherwise exists. That section exempts from the operation of Sections 6 and 7 executive, administrative, and professional employees. Since such employees customarily do not have physical contact with the goods or materials, in petitioner's view they are not covered even in the absence of the exemption.

Petitioner's limitation upon the types of occupations which are covered by Section 3 (j), whether or not the excluded types are "necessary to the production" by any pragmatic standard, flies in the face of an apparent legislative intention to import realistic scope into the coverage provision. Congress deliberately substituted the phrase "or in any process or occupation necessary to the production" for the specific and

inflexible phrase, which had appeared in earlier drafts of the bill, "or in the making of tools and dies used in the production" (note 7, p. 15, *supra*). The obvious purpose of this substitution was considerably to broaden the coverage of the Act by permitting the courts, in the light of the facts of particular cases, to determine which activities are "necessary" to production. Cf. *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466–468. Had Congress intended to incorporate into Section 3 (j) any such hard and fast rule as petitioner suggests, it would certainly not have chosen the words which it used to accomplish its objective.

Further, the apparent intention to include the activities of tool and die workers within the last clause of Section 3 (j) demonstrates that Congress deemed the Act applicable to employees performing necessary processes preparatory to production, although they do not have physical contact with the goods at any stage of the production.[25] But if "non-contact" employees whose activities are necessary to the inception of production are covered, no reason appears why "non-contact" employees whose services are necessary to the contin-

[25] Compare *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5), holding the Act applicable to employees in rotary drilling crews whose work ceases before the oil wells are "brought in". And see also petitioner's concession at page 54 of its brief that "perhaps some employees are to be included who do not come in physical contact with the goods".

uance of production should not likewise be covered. Any such distinction is without basis in reason or relevant policy. If tool and die workers are deemed to be engaged in production, employees who supply the heat, light, power, transportation, and other services facilitating production must, by a parity of reasoning, be deemed engaged in production. There is but a single statutory test subsumed in the term "necessary to the production" and the test must be applied to both types of employees in like manner.

Finally, the subsequent legislative history of the Act adds to the difficulties of petitioner's "physical contact" limitation. Within a month after the effective date of the Act, the Administrator advised employers that Sections 6 and 7 were

> not limited merely to employees who are engaged in physical work on the product itself * * *. Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, stenographers, messengers, all of whom must be considered as engaged in processes or occupations "necessary to the production" of the goods.[29]

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[29] Interpretative Bulletin No. 1, par. 5, issued in November 1938. Representing "the contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," the Administrator's advisory interpretation is entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Co.* v. *United States*, 288

If this early and consistently maintained administrative interpretation, upon which attention was focussed by repeated judicial approval (*infra*, pp. 41–44), had distorted the legislative intent, it might be supposed that Congress would have amended the Act, repeatedly before it for amendment in other respects, so as to repudiate the distortion. To the contrary, however, an amendment proposing to exempt from Section 7 "service, maintenanee, and other workers not engaged directly in the production of goods for commerce" was twice defeated in the House. 86 Cong. Rec. 5268, 5457.[39] The defeat of this proposal imports

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U. S. 294, 315. In petitioner's view, "where the Administrator interprets the law *not* to apply his opinion is presumptively correct. But where he interprets the law as applicable little or no weight should be given his opinion as such" (Brief, 92). This astonishing admonition is based upon an assertion, unjustified by anything in the Bulletin that the Administrator "resolves all doubts in favor of coverage"; the salutary principle of the *American Trucking Assns.* case is thus restricted, with reference to opinions of the Administrator in favor of coverage, to situations in which no "doubts" exist. In such situations the principle is supererogatory.

For the convenience of the Court, copies of Interpretative Bulletins Nos. 1, 5, and 6 have been filed with the Clerk.

[39] Amendments to H. R. 5435 and 7133, 76th Cong., 3d Sess., offered by Congressman Kitchens on April 30, 1940, and again on May 2, 1940. The fact that the proposed amendment did not attempt to exempt such employees from Section 6 is further indication that Congress deemed them within the scope of the Act. So far as we can determine, there has been no proposal advanced in Congress to exempt such employees from the minimum wage provisions.

Congressional recognition that the Administrator's rejection of the "physical contact" limitation is correct. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488.

Petitioner cites not a single decision which has adopted the "physical contact" distinction.[31] On the other hand, many courts, including the First,

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[31] The cases cited by petitioner for the proposition that "maintenance and service employees are [not] engaged in the production of goods for commerce" (Brief, note 1, pp. 59–60), do not touch upon the "physical contact" distinction. *Carlton* v. *London Mines*, 4 Wage Hour Rept. 561 (D. C. Colo.) involved a weighmaster at a mine who did handle the goods and *Hart* v. *Gregory*, 4 Wage Hour Rept. 605 (Sup. Ct. N. C.) concerned a watchman who guarded the plant; both courts held that the requisite showing of "necessary to the production" had not been made, but neither referred to "physical contact." The other cases cited are remote from the point. The *Abadie*, *Cecil*, *Robinson*, *Merryfield*, *Farr*, *Bowman*, and *David* cases are discussed at pages 32–33, *supra*. *Overstreet* v. *North Shore Corp.*, 4 Wage Hour Rept. 628 (S. D. Fla.) concerned employees engaged in repairing a toll road; its citation, and that of the *Pedersen* case (*supra* note 22, p. 32) constitute a play on the word "maintenance"; no production for commerce was involved in either case. Such production was likewise absent in *Brown* v. *Carter Drilling Co.*, 38 F. Supp. 489 (S. D. Tex.) (watchman guarding idle oil rig) and *Brown* v. *Bailey*, 4 Wage Hour Rept. 108 (Ct. App. Tenn.) (maintenance employee of wholesaler distributing exclusively within the state). *Rogers* v. *Glazer*, 32 F. Supp. 990 (W. D. Mo.) and *Sybert* v. *Bradley*, 4 Wage Hour Rept. 630 (S. D. Ill.) were decided on the "service establishment" exemption (*infra*, pp. 51–56). Despite the nature of its citations, petitioner purports to achieve an almost even division of authority by eliminating from the cases unfavorable to it "dicta, unreported cases, and memorandum opinions that do not reveal the facts" (Brief, note 1, pp. 59–60).

Second, Fourth, and Tenth Circuits,[32] the only Circuit Courts of Appeals to pass on the question in addition to the court below, have held the Act applicable to a wide variety of employees performing necessary maintenance or clerical functions which did not involve "physical contact" and which differed in no pertinent respect from the activities of the employees here involved. Thus watchmen,[33] firemen,[34] carpenters,[35] electric-

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[32] *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387 (C. C. A. 1); *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term; *Hamlet Ice Co.* v. *Fleming*, decided April 13, 1942 (C. C. A. 4); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 5 Wage Hour Rept. 275 (C. C. A. 10).

[33] *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387 (C. C. A. 1); *Lefevers* v. *General Export Iron & Metal Co.*, 36 F. Supp. 838 (S. D. Tex.); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.); *Jacobs* v. *Coppersmith & Sons*, decided Feb. 10, 1940 (E. D. N. C.); *Campbell* v. *Superior Decalcomiinia Co.*, 31 F. Supp. 663 (N. D. Tex.); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (Co. Ct. Minn.), affirmed, 5 Wage Hour Rept. 188 (Sup. Ct. Minn.); *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 309 (E. D. Tenn.); *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90 (N. D. Tex.); *Doyle* v. *Johnson Bros.*, 176 Misc. 656, 28 N. Y. S. (2d) 452 (City Ct.); *Dollar* v. *Cadd & River Lumber Co.*, 4 Wage Hour Rept. 521 (W. D. Ark.); *Flores* v. *Baetjer*, 4 Wage Hour Rept. 471 (D. P. R.); *Niehaus* v. *Greenspon's Sons Pipeline Co.*, decided July 11, 1941 (Co. Ct. Mo.); *LaRue* v. *S. H. Robinson & Co.*, decided February 14, 1941 (Co. Ct. Tenn.), affirmed sub nom., *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. (2d) 359 (Ct. App. Tenn.), affirmed 156 S. W. (2d) 432 (Sup. Ct. Tenn.); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 42 F. Supp. 908 (E. D. Okla.), affirmed, 5 Wage Hour Rept. 275 (C. C. A. 10); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.),

ians,[34] engineers and mechanics,[35] janitors, porters and handymen,[36] messengers,[37] telephone operators,[38] various types of clerical workers,[39] and

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pending on appeal to the Seventh Circuit; *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio), pending on appeal to the Sixth Circuit; *Fleming* v. *Hamlet Ice Co.*, 4 Wage Hour Rept. 518 (E. D. N. C.), affirmed April 13, 1942 (C. C. A. 4); *Crompton* v. *Baker*, 220 N. C. 52, 16 S. E. (2d) 471; *Gonzalez* v. *Central Monserrate*, decided August 23, 1941 (D. P. R.), pending on appeal to the First Circuit; *Milam* v. *Texas Spring & Wheel Co.*, 157 S. W. (2d) 653 (Civ. App. Tex.); *Hanson* v. *Queensboro Farm Products, Inc.*, 5 Wage Hour Rept. 255 (Sup. Ct. N. Y.); *Johnson* v. *Phillips-Buttorff Mfg. Co.*, 5 Wage Hour Rept. 112 (Ch. Ct. Tenn.); *Berger* v. *Clouser*, 36 F. Supp. 168 (M. D. Pa.); *Pruett* v. *Carruthers & Son Lumber Co.*, 5 Wage Hour Rept. 192 (Ct. App. Tenn.); *Spinner* v. *Waterways Fuel & Dock Co.*, 5 Wage Hour Rept. 137 (Ct. App. Ohio).

[34] *Wood* v. *Central Sand & Gravel Co.*, *Doyle* v. *Johnson Bros.*, *Crompton* v. *Baker*, *Williams* v. *General Mills*, *Fleming* v. *Swift & Co.*, all *supra*.

[35] *Bowie* v. *Gonzalez*, *Fleming* v. *Hamlet Ice Co.*, *Gonzalez* v. *Central Monserrate*, all *supra; Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), pending on appeal to the Fifth Circuit.

[36] *Bowie* v. *Gonzalez*, *Fleming* v. *Atlantic Co.*, *Williams* v. *General Mills*, *Gonzalez* v. *Central Monserrate*, all *supra; Abroe* v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. 38 (Mun. Ct. Minneapolis), affirmed, 300 N. W. 456 (Sup. Ct. Minn.).

[37] *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Fleming* v. *Atlantic Co.*, *Fleming* v. *Swift & Co.*, *Crompton* v. *Baker*, *Abroe* v. *Lindsay Bros. Co.*, *Niehaus* v. *Greenspon's Sons Pipeline Co.*, all *supra*.

[38] *Bowie* v. *Gonzalez*, *supra; Gonzalez* v. *Central Monserrate*, *supra*.

[39] *Bowie* v. *Gonzalez*, *supra*.

[40] *Fleming* v. *Atlantic Co.*, *supra; Wilkinson* v. *Noland Co.*, 40 F. Supp. 1009 (E. D. Va.); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y.), pending on appeal to Appellate

cookhouse employees [41] have been held to be engaged in "occupations necessary to the production".

Overlapping its "physical contact" limitation is petitioner's distinction between employees "necessary to the enterprise" and those "necessary to the production" (Brief, 50–51, 60). Like the "physical contact" test, this distinction purports to exclude all maintenance workers, including those employed directly by the producer; the argument is, in effect, that employees may be necessary to an essentially productive enterprise and yet not be necessary to the production carried on by it. This distinction is obviously too ephemeral to serve as an aid in construction of the Act. In an attempt to give it content, petitioner suggests that only those employees are "necessary to production" who "directly function" in production (Brief, 55). Yet if this criterion has any meaning, it is limited to those employees who perform the specific activities enumerated in Section 3 (j); thus, it denies all effect to the phrase "in any process or occupation

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Division, 1st Dept.; *Mortenson* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 (S. D. Iowa); cf. *Owin* v. *Liquid Carbonic Corp.*, 5 Wage Hour Rept. 69 (S. D. Tex.); *Monk* v. *Continental Baking Co.*, 5 Wage Hour Rept. 205 (N. D. Tex.).

[41] *Ikola* v. *Snoqualmie Falls Lumber Co.*, 4 Wage Hour Rept. 470 (Super. Ct. Wash.), reversed on other grounds, 121 P. (2d) 369 (Wash); *Womack* v. *Consolidated Timber Co.*, 5 Wage Hour Rept. 10 (D. Oreg.), pending on appeal to the Ninth Circuit.

necessary to the production" (see *supra*, pp. 36–37). Furthermore, the distinction between "employees necessary to the enterprise" and those "necessary to the production," like the "physical contact" limitation, renders the exemptive provisions of Section 13 (a) (1) superfluous.[42]

Petitioner further suggests that the term "necessary," as used in Section 3 (j), is to be interpreted as equivalent to "indispensable," and that the court below erred in refusing so to rule. The court held that petitioner's elevator operators, engineers, and firemen were covered by the Act because their activities "were so necessary to the production * * * as to be indispensable to

[42] The cases upon which petitioner places heaviest reliance recognized the dependence of the production itself upon the work of maintenance employees but held the Act inapplicable because the producer was not the employer. *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 N. Y. App. Div. 691 (1st Dept.), leave to appeal to the New York Court of Appeals denied, 259 App. Div. 1076; *Merryfield* v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794 (D. N. H.), pending on appeal to the First Circuit. The only authority for the distinction which petitioner suggests is a dictum in *Rogers* v. *Glazer*, 32 F. Supp. 990, 993 (W. D. Mo.).

Petitioner attempts to justify the distinction on the ground that the Administrator deems all employees of an employer producing some goods for commerce to be within the Act (Brief, 50). The Administrator has never taken that position; on the contrary, he has recognized that an employer producing goods both for interstate and intrastate commerce may, by appropriate segregation of employees, insulate from the application of the Act those employees who produce goods exclusively for intrastate commerce. See note 27, p. 35, *supra*.

that production"; it held further that the Act covered the watchmen, carpenters, and porter because their services were "necessary in that they are both convenient and appropriate * * *" (R. 219–220).

Neither the terms of the Act nor its legislative history contains any indication that Congress intended to limit the application of the Act to employees who were indispensable to production. The reasonable interpretation made by the court below finds precedent in this Court's application of the Federal Employers' Liability Act. In *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, the Court held that a mess cook and camp cleaner for a bridge repair gang was engaged "in commerce" within the meaning of that statute although the repair work concededly could have proceeded without the services which he performed. The Court said (pp. 103–104):

> He was employed * * * no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. * * * Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act."

"While the Fair Labor Standards Act does not expressly erect the "necessary" test with respect to employees alleged to be engaged "in commerce" rather than in "production"

In addition to the court below, two other courts have had occasion to consider, and have rejected, the "indispensability" standard which petitioner suggests. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 5 Wage Hour Rept. 275 (C. C. A. 10); *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. (2d) 359, 361

(Sections 6, 7), the courts have properly filled the interstice. *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.), pending on appeal to the Third Circuit; *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.); *Fleming* v. *Alterman*, 38 F. Supp. 94 (N. D. Ga.); *Drake* v. *Hirsch*, 40 F. Supp. 290 (N. D. Ga.); *Owin* v. *Liquid Carbonic Corp.*, 5 Wage Hour Rept. 69 (S. D. Tex.); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y.), pending on appeal to the Appellate Division, 1st Dept.; *Wilkinson* v. *Noland Co.*, 40 F. Supp. 1009 (E. D. Va.); *Mingee* v. *Dixie Greyhound Lines*, decided May 16, 1941 (W. D. Tenn.), pending on appeal to the Sixth Circuit; *Missel* v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25 (C. C. A. 4), pending on writ of certiorari, No. 939, present Term; *Eddings* v. *Southern Dairies*, 5 Wage Hour Rept. 87 (E. D. S. C.); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex.); *Atkocus* v. *Terker*, 30 N. Y. S. (2d) 628 (Mun. Ct.); *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (M. D. Ala.). There is abundant authority for such a construction of the Act in cases construing and applying similar remedial labor legislation. See particularly *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333 (supervisors and clerks of telegraph agency); *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103 (editorial employees of news gathering and distributing agency); *Texas & N. O. R. R. Co.* v. *Railway Clerks*, 281 U. S. 548; *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515; *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2d) 458 (C. C. A. 10) (repairmen, clerks, machinists, boilermakers, blacksmiths, sheet-metal workers, electricians, carmen, and power-plant employees of railroad carriers).

(Ct. App. Tenn.), affirmed, 156 S. W. (2d) 432 (Sup. Ct. Tenn.). There are no contrary decisions.

II

PETITIONER'S FREIGHT ELEVATOR OPERATORS ARE ALSO "ENGAGED IN COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7

The Circuit Court of Appeals held that, in addition to being engaged in production for commerce, petitioner's freight elevator operators

> are also directly engaged in commerce, for although their activities take place entirely within the state they carry out one step in the actual transportation of the goods to points outside the State (R. 219).

This conclusion is plainly correct unless the substantial and continuous interstate flow of goods out of the manufacturing plants can be said to begin at the portals of petitioner's building. But the goods are delivered into the custody and control of the interstate carrier at the manufacturer's loft; the passage from loft to street is the first step in the performance of the carrier's contract for transportation of the goods from the manufacturer to his consignee. The brief halt at the street level for loading onto a truck cannot be said, in any realistic sense, to mark the end of one journey and the beginning of another. Cf. *Mid-Continent Pipe*

Line Co. v. *Hargrave*, 5 Wage-Hour Rept. 275 (C. C. A. 10). Nor does any such result follow simply because part of the transportation is "vertical" and the remainder "horizontal."

It is also clear that the transportation by elevator is part of the interstate journey in the case of incoming goods. The destination of the goods is the manufacturer's loft, not petitioner's unloading platform, and the interstate transportation does not end until the goods reach the destination intended by the shipper. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Federal Trade Commission* v. *Pacific States Paper Assn.*, 273 U. S. 52, 64. Indeed, performance of the carrier's contract for interstate transportation is completed only when delivery is accepted by the consignee, the manufacturer, at his own premises on a certain floor of petitioner's building. Cf. *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 219; *Baltimore & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540; *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90.[44] Nor does petitioner suggest any point at which the goods may

[44] The incoming and outgoing shipments are sometimes handled by transfer or express companies who have received the goods from, or are to deliver them to, the interstate carrier. This circumstance is immaterial and the shipments so handled differ in no pertinent respect from those received from or delivered to the carrier itself at the manufacturer's premises. Cf. *The Daniel Ball*, 10 Wall. 557, 565.

be said to come to rest before their delivery to the consignee.

The decisions under the Act, pursuant to established principles (see, e. g., *Pedersen* v. *Delaware, Lackawanna & W. R. R.*, 229 U. S. 146, 151), have recognized that the words "engaged in commerce" should not be limited to employees who actually transport goods across state lines.[*] And, unless the Act is to be so limited, it is clear that employees whose activities supply the indispensable initial and terminal links in the extensive interstate transportation moving into and out of petitioner's building are within its scope.

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[*] *Mid-Continent Pipe Line Co.* v. *Hargrave*, 5 Wage Hour Rept. 275 (C. C. A. 10) (watchman guarding pipe line carrying oil of independent company entirely within state from wells to refinery from which, after processing, the oil moved in commerce); *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W. D. Va.) (truck drivers hauling mail between post office and depot of interstate carrier); *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434 (W. D. Mo.), affirmed, 5 Wage Hour Rept. 241 (C. C. A. 8); *Williams* v. *Jacksonville Terminal Co.*, 35 F. Supp. 267 (S. D. Fla.), affirmed on other grounds, 118 F. (2d) 324 (C. C. A. 5), affirmed, No. 112, present Term, March 2, 1942 ("red caps"); *Gavril* v. *Kraft Cheese Co.*, 4 Wage Hour Rept. 682 (N. D. Ill.) (truck drivers delivering from branch warehouses to retail stores goods received by the branch warehouse from the main warehouse which in turn received the goods from outside the state); *Hamlet Ice Co.* v. *Fleming*, decided April 13, 1942 (C. C. A. 4) (employees delivering ice within the state to interstate carrier); *Travis* v. *Ray*, 41 F. Supp. 6 (W. D. Ky.) (bus driver carrying passengers to and from depot of interstate carrier); and see cases cited in note 43, pp. 46–47, *supra*. See also *Southern Pac. Co.* v. *Gallagher*, 306 U. S. 167, 179, n. 39.

III

PETITIONER'S EMPLOYEES ARE NOT ENGAGED IN A "RETAIL OR SERVICE ESTABLISHMENT" WITHIN THE MEANING OF SECTION 13 (a) (2) OF THE ACT

Section 13 (a) of the Act provides that

> The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Petitioner contends that its maintenance employees are engaged in a "service establishment" within the meaning of this exemption. The contention consists of a broad interpretation of the quoted terms as covering all enterprises providing facilities rather than manufacturing or selling merchandise. The Government's position, accepted by the court below (R. 221), is that Section 13 (a) (2) was intended to exempt employees engaged in establishments which cater to the needs of the ultimate consumer, whether such needs be for goods or for services.

The legislative history (see note 13, p. 25, *supra*) indicates that this was the purpose of Section 13 (a) (2). The differing versions of the bill passed by the two houses of Congress agreed in exempting any person employed in a "local retailing capacity."[46] The bill as passed by the House fur-

[46] S. 2475, passed by the Senate July 31, 1937, Sec. 2 (a) (7). S. 2475, passed by the House May 24, 1938, Sec. 11

ther exempted "any retail industry the greater part of whose selling is in intrastate commerce." [47] The Conference Committee extended the exemption to "service" establishments and reported Section 13 (a) (2) in its present form.[48] While neither the report of that Committee nor the debates on the bill it reported to both houses of Congress sheds light on the reason for this addition, it is a rational inference that the Committee desired to make clear that the exemption covered not only the local butcher shop but its neighboring valet establishment as well. Under the bill as passed by the House, which provided for the exemption of retail industries "selling" in intrastate commerce, the status of such service establishments was doubtful.

Had the insertion of the express "service establishment" exemption been intended to have any more far-reaching effect, the pattern of the Conference Committee report (*supra,* note 48) indicates that an explanation would have been forthcoming. And the fact that no one challenged the addition indicates a rather uniform understanding that there was no intent to exempt a new

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(a) (1). The committee hearings and debates which preceded passage of the bills reflect an acute Congressional concern about applying the Act to the small retailer and similar businesses. See 83 Cong. Rec. 7436-7438; Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200 (75th Cong., 1st Sess.), pp. 35–37.

[47] S. 2475, passed by the House May 24, 1938, Sec. 6.

[48] H. Rep. No. 2738, 75th Cong., 3d sess., pp. 9, 32.

and wholly unrelated segment of the industrial community.

Petitioner's business partakes of none of the characteristics connoted by the term "service establishment".[49] As the proprietor of a loft building devoted to production, it is not an "establishment" devoted to "servicing"; it rents lofts to manufacturers and supplies employees necessary to successful operation of the enterprises there conducted (see R. 220–221). The neighborhood shoe repair "establishment" renders services as the essence of its existence. In regard to its clientele, location, appearance, personnel, and hours of remaining open, such an establishment closely resembles the "retail * * * establishment" with which it is grouped in Section 13 (a) (2). These two very similar kinds of establishments presented an identical problem in framing the statute and a common solution was reached as to them.[50] Petitioner's enterprise, resembling neither kind of

[49] The term "establishment" is not synonymous with "business" or "enterprise"; it connotes a physical place of business. See Interpretative Bulletin No. 6, pars. 33–43. If petitioner's building may properly be called an "establishment" at all, it would be a "manufacturing establishment" since it is devoted primarily to manufacturing operations.

[50] Aside from problems common to both types of establishments, it is plain that the exemption of one but not the other would have left a rather extensive "twilight zone." For example, the ordinary gasoline service station sells gasoline, oil, and automobile accessories at retail but also repairs and mounts tires and tubes, washes, simonizes, and lubricates automobiles, and otherwise performs numerous tasks that cannot be described as retail "selling."

establishment in any of their distinguishing characteristics, falls outside the scope both of the problem and of its solution.[51]

The breadth which petitioner would ascribe to the term "service establishment" renders meaningless other provisions of the Act. The statute contains express exemptions for small telephone exchanges, suburban or interurban railways, local trolley and bus lines, motor freight carriers, grain elevators, warehouses storing agricultural products, stockyards handling livestock, and establishments engaged in ginning or compressing cotton for farmers.[52] Under petitioner's theory, all of

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[51] In Interpretative Bulletin No. 6, revised June 1941, par. 24, the Administrator stated that "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalp-treatment establishments; masseur establishments; funeral homes; embalming establishments; crematories; establishments engaged in cleaning, dyeing, pressing, altering, and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoeshine parlors; dress-suit rental establishments; public garages; automobile laundries; 'drive it yourself' establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

[52] See Sections 7 (b) (3), 7 (c); 13 (a) (9), (10), (11); 13 (b) (1). Petitioner's suggestion that the exemptions are not mutually exclusive (Brief, 60) affords no answer. For

these express exemptions would be superfluous, since all of the enterprises mentioned would be encompassed within the terms of Section 13 (a) (2). And petitioner's interpretation would deny the benefits of the Act to employees engaged in scores of industries [53] whose only distinction from industries concededly subject to the Act lies in the fact that they do not sell a tangible product.

The familiar principle that a strict construction is to be given to exceptions to a remedial statute of general scope and embodying a broad legislative policy is fully applicable to the Fair Labor Standards Act. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 16 (C. C. A. 1); cf. *United States* v. *Dickson*, 15 Pet. 141, 165; *Gregg Cartage & Storage Co.* v. *United States*, No. 555,

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example, cotton ginning and compressing enterprises not within the area of production mentioned in Section 13 (a) (10) are, pursuant to Section 7 (c), exempt from the maximum hour provisions of Section 7 (a) but not from the minimum wage provisions of Section 6. But if such enterprises are exempt from both Section 6 and Section 7 (a), as "service establishments" within the meaning of Section 13 (a) (2), the specific exemption from Section 7 (a) granted by Section 7 (c) makes no sense and conflicting legislative intentions result. Compare Section 13 (b) (1).

[53] The industries whose members have claimed the benefit of the "service establishment" exemption, but which were not deemed by the Administrator to be sufficiently similar to retail establishments to be entitled thereto, are enumerated in paragraph 29 of Interpretative Bulletin No. 6, revised June 1941. Typical of such industries are: banks, insurance companies, radio broadcasting stations, stock brokers, and printing and binding and photostat companies.

present Term, decided April 13, 1942. Petitioner has failed to sustain the burden of taking itself out of the sweep of the Act by demonstrating that its enterprise is within either the language or the policy of Section 13 (a) (2).[54]

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[54] The lower federal courts have rejected the broad interpretation which petitioner advances. See the following cases in which the exemption was held not to apply: *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90 (C. C. A. 5) (selling and servicing refrigeration units for commercial use in butcher shops, restaurants, etc.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.) (fixture repair shops, warehouses, and other nonselling units servicing stores of a chain store system); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.) (installation, maintenance, and repair of elevators); *Fleming* v. *Tidewater Optical Co.*, 35 F. Supp. 1015 (E. D. Va.) (grinding and polishing lens blanks for optometrists and doctors); *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.) (tobacco auction warehouse); *Collum* v. *Stevens*, 5 Wage Hour Rept. 304 (N. D. Tex.) (industrial machine and repair shop); *Mill* v. *U. S. Credit Bureau*, 5 Wage Hour Rept. 114 (S. D. Cal.) (commercial collection agency). See also *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 46, 47 (W. D. Tenn.); *Stucker* v. *Roselle*, 37 F. Supp. 864, 867 (W. D. Ky.). Of the cases cited by petitioner (Brief, 65, 69, 70) *White Motor Co.* v. *Littleton*, 124 F. (2d) 92 (C. C. A. 5), *Collins* v. *Kidd*, 38 F. Supp. 634 (E. D. Tex.), and *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S. D. Tex.) were all based on the "retail * * * establishment" terminology of Section 13 (a) (2) and do not support petitioner's views as to "service establishments." *Womack* v. *Consolidated Timber Co.*, 5 Wage Hour Rept. 10 (D. Ore.), pending on appeal to the Ninth Circuit, involved a restaurant. *Beatty* v. *Foutz Tool Co.*, 5 Wage Hour Rept. 259 (S. D. Cal.), held an industrial machine shop to be a service establishment; it is contrary to *Collum* v. *Stevens*, *supra*.

IV

THE ACT, AS APPLIED TO THE EMPLOYEES HERE INVOLVED, CONSTITUTES A VALID EXERCISE OF THE COMMERCE POWER

Petitioner contends that the Act, if applied to any of the employees included within the injunction, offends against the Tenth Amendment.[55] This Court in *United States* v. *Darby Lumber Co.*, 312 U. S. 100, sustained the Act as a valid exercise of the commerce power; since that decision, however, was limited to the particular activities alleged in the indictment to constitute "production for commerce" (312 U. S. at 117), the constitutional question is not foreclosed to petitioner.

We believe it clear that whenever the activities of any employee satisfy the statutory test that they be "necessary to the production" of goods for interstate commerce, they also meet the constitutional requirement that the intrastate activities regulated have a "substantial effect" upon commerce or bear a "direct" or "close" relation to it. *United States* v. *Darby, supra,* at 119–120. Accordingly, the contentions we have advanced to establish that the employees satisfy the statutory test likewise demon-

[55] The Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U. S. 100, 124. Our argument is framed, therefore, in terms of whether the regulation of the activities of petitioner's employees is within the delegated power of Congress over interstate commerce.

strate that such activities are within the permissible scope of federal control.

It is familiar doctrine that the commerce power "is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37. And "the close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry * * *." *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 464. The employees whose work bears the requisite relation to commerce need not be themselves engaged in the manufacture nor need their employer be the producer of the goods for commerce; it is sufficient that the cessation of their labors would have a direct and deleterious effect upon commerce. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; cf. *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515.

The findings of Congress in the National Labor Relations Act that stoppage of productive operations by industrial strife arising from unfair labor practices of employers would result in burdens and obstructions to commerce in the goods produced (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, at 41) find their counterpart in the Congressional findings upon which the Fair Labor Standards Act is based. Section 2 of

the Act states that the observance by employers of substandard labor conditions "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce." It is, of course, a matter of common knowledge that strikes and lock-outs spring as well from wage and hour issues as from interference by employers with the self-organization and collective bargaining of employees, and that wages and hours are one of the principal subjects of the bargaining process.

We have already pointed out how necessary the activities of the employees covered by the injunction are to the manufacturing processes conducted in the building. The operation of the elevators is necessary for the delivery of incoming goods and the shipment of outgoing goods; the operation of the steam plant is necessary to heat the building, to run many of the pressing machines, and for sponging and shrinking processes. The generation of electricity is necessary to light the common portions of the building and for the operation of a large number of sewing machines. And the watchmen, the porter, and the carpenters are necessary to insure that the premises in which the manufacturing processes are conducted are properly guarded and maintained.

That these activities cannot be characterized as merely incidental to production for commerce is demonstrated by the fact that cessation of work by petitioner's employees would have an immediate and direct effect upon the manufacturing operations

conducted in the building. "Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another." *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278, 279 (C. C. A. 2), now pending on writ of certiorari, No. 924, present Term. Without heat the building would be uninhabitable and production impossible; without steam the pressing, sponging and shrinking operations would come to a halt; without electricity sewing operations would cease, except hand sewing (*supra*, pp. 5–6). If elevator service failed, cutters, stitchers and their employers could not reach their place of work, the goods to be delivered to and taken from the building in interstate commerce could not be moved, and production would cease (*supra*, pp. 6–8). Similarly, cessation of necessary custodial, cleaning and repair activities would render the building unfit for continued production (*supra*, p. 8). The directly injurious effect upon commerce is cogently illustrated by the proof in the record, which we have already mentioned, concerning the strike of maintenance employees in New York City during 1939 (*supra*, pp. 16–17).

While stoppage of the activities of petitioner's employees would not bring about a city-wide "catastrophe" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221), it would be catastrophic for the manufacturers in petitioner's building, for in the absence of the

facilities furnished by petitioner's employees, the manufacture, sale and shipment of their product could not continue. That fact alone establishes the requisite national interest and justifies the Congressional regulation.

The same result is reached if one views the occasion for the exercise of the commerce power in this Act to be solely the need to protect interstate commerce from substandard competition. See *United States* v. *Darby Lumber Co., supra.* Since petitioner's employees, equally with those engaged in production activities for the manufacturers, are necessary to the production of the goods, those goods would move in interstate commerce as the result of substandard wages and hours if the Act were not applicable. There can be no limitation upon the power of Congress to protect interstate commerce which would exclude necessary maintenance employees yet include "production" employees. The interstate shipment results from the labor of each; the effect of substandard labor conditions is no different in either case; and the Congressional purpose to secure the prescribed labor standards for those who contribute to interstate commerce cannot have differed according as the employee is engaged in production or in other necessary work.

If the employees here involved were employed by the manufacturers, rather than by petitioner, there could be no doubt of the constitutional power to regulate their wages and hours. The National

Labor Relations Act has been consistently applied to all employees of such manufacturers and the validity of such regulation is established. Cf. *Virginia Electric Power Co.* v. *National Labor Relations Board*, 115 F (2d) 414, 415–416 (C. C. A. 4), reversed on another ground with approval of the decision below on this point, Nos. 25, 26, this Term, decided December 22, 1941; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515; *Texas & N. O. R. R. Co.* v. *Railway Clerks*, 281 U. S. 548. Certainly if the constitutional power existed while petitioner was itself occupying the entire building as a single factory, petitioner's particular arrangement for continued use of the building for production cannot be said to have vitiated the power. Cf. *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 92–94; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9), certiorari denied, 312 U. S. 678; compare *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278, 280 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term. The activities of the employees have remained the same and it is the relation of those activities to commerce that determines the scope of the federal power.

Petitioner emphasizes that the National Labor Relations Act extends to unfair labor prac-

tices "affecting commerce" while the Fair Labor Standards Act extends to employees whose occupations are "necessary to the production." Whatever the relevance of this distinction as a matter of statutory construction (*supra*, pp. 28–30), it is immaterial to the question of the extent of the federal power. The commerce clause does not expand and contract with the terminology of particular statutes.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

Nos. 910, 924.—October Term, 1941.

910	A. B. Kirschbaum, Petitioner, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
924	Arsenal Building Corporation and Spear & Co., Inc., Petitioners, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 1, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In *United States* v. *Darby*, 312 U. S. 100, and *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, the constitutionality of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, was sustained. In the cases now before us we are required to consider the scope of the Act in relation to a particular phase of industrial activity. Specifically, the problem is this: Under § 6 of the Act an employer must pay prescribed minimum wages "to each of his employees who is engaged in commerce or in the production of goods for commerce", and under § 7 overtime compensation must be given "any of his employees who is engaged in commerce or in the production of goods for commerce". Section 3(j) provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." The employees here are engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce are produced. Does the Fair Labor Standards Act extend to such employees?

The facts in the two cases differ only in minor detail. In No. 910, the petitioner owns and operates a six-story loft building in Philadelphia. The tenants are, for the most part, manufacturers of men's and boys' clothing. In No. 924, the petitioners own and operate a twenty-two story building located in the heart of the New York City clothing manufacturing district. Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases the tenants of the buildings are principally engaged in the production of goods for interstate commerce. In No. 910, the petitioner employs an engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter, and a carpenter's helper. In No. 924, the controversy involves two firemen, an electrician, fourteen elevator operators, two watchmen, and six porters. These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen, and visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable.

Deeming these employees within the Act because of their relationship to the activities of the tenants, the Administrator brought suits to enjoin the petitioners from violating the Act by paying wages at lower rates than those fixed by the Act. In No. 910, the District Court granted an injunction, 38 F. Supp. 204, and the Circuit Court of Appeals for the Third Circuit affirmed. 124 F. 2d 567. In No. 924, the District Court denied an injunction, 38 F. Supp. 207, but the Circuit Court of Appeals for the Second Circuit reversed. 125 F. 2d 278. Despite this concurrence of views of the two Circuit Courts of Appeals,[1] we brought the cases here

[1] Compare Warren-Bradshaw Drilling Co. v. Hall, 124 F. 2d 42; Killingbeck v. Garment Center Capitol, Inc., 259 N. Y. App. Div. 691; Robinson v. Massachusetts Mut. Life Ins. Co., 158 S. W. 2d 441 (Tenn.); Cecil v. Gradison, 40 N. E. 2d 958 (Ohio App.); Pedersen v. Fitzgerald Construction Co., 262 N. Y. App. Div. 665.

because of the important questions presented as to the scope of the Fair Labor Standards Act. 315 U. S. —.

To search for a dependable touchstone by which to determine whether employees are "engaged in commerce or in the production of goods for commerce" is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn under a federal enactment between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.

The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. See, *e. g.*, *Virginian Ry.* v. *Federation*, 300 U. S. 515. Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the "commerce" protected by the Sherman Law. Compare, for example, *United Leather Workers* v. *Herkert*, 265 U. S. 457, and *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, with *Labor Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, and *Labor Board* v. *Fainblatt*, 306 U. S. 601. Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245,

and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, with *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the michief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated; are only local. One need refer only to the history of Congressional control over the rates of intra-state carriers which affect interstate commerce,[2] and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who "shall, in any way directly or closely and substantially, affect" interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

The Administrator does not contend that the employees in the cases before us are within the Act because Congress could have placed them there. The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have oc-

[2] For the gradual development of this extension of federal authority, see Shepard v. Northern Pac. Ry. Co., 184 Fed. 765, reversed *sub. nom.* The Minnesota Rate Cases, 230 U. S. 352; Houston & Texas Ry. v. United States, 234 U. S. 342, as applied in Ill. Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493, and as confirmed by § 416 of the Transportation Act of 1920, 41 Stat. 456, 484, and as extended by § 13(4) of the Interstate Commerce Act. Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563.

cupied. As passed by the House, the bill applied to employers "engaged in commerce in any industry affecting commerce". See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees "engaged in commerce or in the production of goods for commerce". H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston & Texas Ry.* v. *United States, supra,* in that it was specifically made applicable to intrastate production which competed with goods produced in another state. S. 2475, 75th Cong. 3rd Sess., as recommitted December 17, 1937, § 8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; see H. Rep. 2182, *supra.*

Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees "engaged in commerce or in the production of goods for commerce", construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise. In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction.

We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act because they were engaged in occupations "necessary to the production" of goods for commerce by the tenants. Without light and heat and

power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, to wit, employees engaged "in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof", encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants. The petitioners assert, however, that the building industry of which they are part is purely local in nature and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce. But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are "engaged in commerce or in the production of goods for commerce", the employer is himself so engaged.[3] Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of § 3(j) which includes employees engaged "in any process or occupation necessary to the production" and thereby does not limit the scope of the statute to the preceding clause which deals with employees "in any other manner working on such goods".

But the petitioners urge that § 3(j) cannot be construed literally, that Congress surely did not design the Act to apply to every employee who happens to perform services that are essential to the production of goods for commerce. But because some employees may not be within the Act even though their activities are in an ultimate sense "necessary" to the production of goods for commerce, it does not follow that no employees whose activities are "necessary" are entitled to the benefits of the Act. Section 3(j) cannot thus be read out of the Act. The lower court in No. 924 met the petitioners' argument by finding the Act applicable to these employees because their work was "in kind substantially the same

[3] The exact scope of the provisions of the Act dealing with the composition, authority, and procedure of advisory committees is not now before us. But, in any event, we do not find in them any limitation upon the area of regulation outlined by §§ 6 and 7.

as it would be if the manufacturers employed them directly". In the immediate situation, the answer may be adequate; but as a guiding criterion it may prove too much. "Necessary" is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. We cannot, in construing the word "necessary", escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense "necessary" to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce.

We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce". What was said about a related problem is not inapposite here: "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection'. In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." *Gully* v. *First Nat. Bank*, 299 U. S. 109, 117.

A final objection to the decisions below need not detain us long. The petitioners' buildings cannot be regarded as "service establishments" within the exemption of § 13(a)(2). Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the "greater part" of the "servicing"

done by the petitioners here is not in intrastate commerce. The suggestion that the Act, if applied to these employees, goes beyond the bounds of the commerce power is without merit. *Labor Board Cases*, 301 U. S. 1; *United States* v. *Darby*, *supra*; *Opp Cotton Mills* v. *Administrator*, *supra*.

In both cases the judgment is

Affirmed.

Mr. Justice Roberts.

I dissent. I think the power of Congress does not reach the purely local activities in question. If it did, the commerce power alone would support regulation of any local action, since it is conceivable that such activity, however remotely, "affects" commerce or is "necessary" to the production of goods for commerce.

But I am convinced that Congress never intended by the statute to reach the employees of the petitioners. Neither the words of the Act, nor its legislative history, nor the purpose to be served, requires the application of the statute in these cases.